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The Year Ahead

Whitney North Seymour

President, American Arbitration Association

There are three areas of arbitration activities that demand our particular attention this year. First, we must extend the acceptance and use of voluntary arbitration in the labor-management field. Second, the congested court calendars throughout the country, and the burden of taxation which makes it difficult to increase the number of judges and court facilities, gives us an opportunity to work with bar associations in the extension of the use of arbitration in the commercial and civil fields and, third, our efforts for the adoption of arbitration as a means of building and rebuilding international goodwill must be redoubled in view of the crucial world situation.

In the labor-management field the new administration has clearly indicated a policy of non-intervention by The White House. David L. Cole, (then) Director of the Federal Mediation and Conciliation Service, recently advised both sides in the strike between the American Locomotive Company and the Steelworkers Union, which threatened to delay and hinder the nation's atomic energy plans, that they could expect no help from the President or anyone else in The White House. There is another alternative to White House intervention, voluntary arbitration. When collective bargaining and mediation fail, the American way of settling a dispute is to agree to submit it to disinterested, impartial arbitrators for determination. Such a procedure is simply a return to the fundamental way of doing things and dependence upon mutual responsibility and cooperation rather than the paternal intervention of government and government regulation.

The wide acceptance of arbitration by management and labor, 90% of whose collective bargaining provide for arbitration of grievances arising out of contracts, is clear evidence of the efficacy of the process. We need only go one step further and apply it to the settlement of disputes regarding the terms of the contract. There has been an increasing use of such arbitration, as has been clearly evidenced by the cases heard in the Association's tribunals in the past few years. The American Newspaper Guild and the Associated Press; Macy's, Gimbels and other department stores in New York City, and the unions in that field; the Textile Workers Union and the leading

woolen mills, as well as the Detroit Edison Company and the International Brotherhood of Electrical Workers, the Conestoga Telephone and Telegraph Company and the same union, are among those who have submitted contract terms and wages to voluntary arbitration.

The American Arbitration Association is particularly heartened by the telegram which the Secretary of Labor, Martin P. Durkin, addressed recently to the Conference co-sponsored by Notre Dame University and the Association in Indiana. Mr. Durkin's telegram read:

"VOLUNTARY PROCEDURES FOR THE SETTLEMENT OF LABOR-MANAGEMENT DISPUTES MAKE A VALUABLE CONTRIBUTION TO THE STRENGTH AND STABILITY OF OUR DEMOCRACY. THEY MAKE POSSIBLE MAINTENANCE OF PRODUCTION WITHOUT LOSS OF FREEDOM. THE UNIVERSITY OF NOTRE DAME AND THE AMERICAN ARBITRATION ASSOCIATION ARE PERFORMING A NOTEWORTHY PUBLIC SERVICE IN HOLDING THEIR CONFERENCE ON ARBITRATION IN LABOR-MANAGEMENT RELATIONS. I AM CERTAIN THAT THE CONFERENCE WILL CONTRIBUTE GREATLY TO THE INCREASED USE AND VALUE OF VOLUNTARY ARBITRATION FOR THE SETTLEMENT OF INDUSTRIAL DISPUTES. YOU HAVE MY BEST WISHES FOR A PRODUCTIVE AND SUCCESSFUL CONFERENCE."

Some thirty years ago a group of judges, lawyers and businessmen, who founded the American Arbitration Association as the first national effort to encourage the use of arbitration, took action because of the calendar delays following the first World War. Today we are confronted with a similar situation. Throughout the country calendars are congested and it is impossible to bring many cases to trial in less than two or three years. Judges, bar associations and citizens generally are much concerned over the situation, made particularly critical because the great tax burden makes it almost impossible to add the number of judges and court facilities necessary to end the delay. Now, as thirty years ago, arbitration is ready to serve. Progress is being made and the recent advertisements by one of the large insurance groups of the country offering to arbitrate personal injury cases is an encouraging step forward, particularly

as much of the delay throughout the country is caused by the numerous cases arising from automobile accidents. Plans should immediately go forward for consultation and cooperation with bar groups to study how arbitration may be used to relieve calendar congestion, and make it unnecessary to increase the burden of the taxpayers.

Disputes in the domestic field are troublesome and unpleasant, but at least we have a common language and usually understand the overtones and background. In international trade, however, with differences of tongues and customs, misunderstanding is harder to overcome and the small business dispute may build up ill-will that will materially hinder and even defeat our nation's endeavors to promote mutual understanding.

The Association's record of last year when nationals of forty-eight countries outside the Iron Curtain participated in arbitrations conducted in the International Tribunal, is a splendid achievement. The signing of the agreement with the Japan Commercial Arbitration Association, representing some three hundred commercial organizations in Japan under which the traders of our two countries will use arbitration clauses in contracts so that disputes may be arbitrated in either country, is another milestone in the advancement of international arbitration. More such agreements must be made and undoubtedly the plan of the International Business Relations Council of the Association for a conference to discuss international trade arbitration, to be held this fall in cooperation with New York University (Law School, School of Education, and Graduate School of Business Administration), will advance this aim.

Satisfactory experience with voluntary arbitration and agreements for the use of arbitration clauses with all countries outside the Iron Curtain, will establish a pattern for the future and build up the understanding and goodwill which are essential stones in the structure of world peace.

Legal Aspects of Labor Arbitration in New England*

Archibald Cox

Professor, Harvard Law School
Former Chairman, Wage Stabilization Board

A court decision which should be a warning to arbitrators and perhaps of interest to the parties as well, turned on the validity of the following award:

> AWARD. The undersigned, arbitrators within named, having heard the parties by their several statements under oath and there being wide divergence in their statements aforesaid, we come to the final conclusion that we do not agree on any conclusion; but our agreement is that the arbitrators shall be paid for their services.

It will be a matter of regret to all arbitrators, if not to the parties, to learn that so statesmanlike a decision was held invalid by the Supreme Judicial Court of Massachusetts.[1] By way of comfort I can only cite another case which suggests that even if a losing party were so outraged by an arbitration award as to bring an action for damages against the arbitrator alleging that the arbitrator and the opposing party had entered into an unlawful conspiracy,—that even if these facts were proved, the arbitrator would not be liable.[2]

The question arises whether those in New England who are interested in the arbitration of disputes arising during the term of collective bargaining agreements should not seek improved legislation dealing with enforcement of agreements for arbitration. At the outset I shall try to outline briefly the present state of the law in the New England States. Second, I shall describe the statutory models such as the Connecticut, New York and California laws on which we might draw. Finally, I would like to call attention to some of the problems that have arisen in States which have enacted legislation on this subject and to suggest possible ways of avoiding difficulties.

I

Current Law

Common law. At common law there is no effective legal sanction by which to enforce an agreement to arbitrate controversies arising

* Address delivered at Conference on Labor-Management Arbitration at Massachusetts Institute of Technology, Cambridge, Mass., on March 28, 1953.

[1] Cf. Smith v. Holcomb, 99 Mass. 552.

[2] Cf. Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424.

under a collective bargaining agreement. Ever since the decision of Lord Coke in the *Vynior's* case[3] in 1609 an agreement to arbitrate has been revocable at any time prior to the award.[4] If you ask me "Why", the best answer I can give is to quote the saying with which my father always silenced a too argumentative son:—"If your mother says 'tis so, 'tis so, if 'tain't so." Similarly, if Lord Coke said 'tis revocable, 'tis revocable if 'tain't revocable. In theory, the revocation is a breach of the contract and an action will lie for damages.[5] In practice, this remedy is useless because the damages recoverable are limited to sums expended preparing for arbitration prior to notice of revocation.[6] In all six New England States, moreover, breach of a promise to arbitrate disputes arising under a collective agreement is not a bar to an action for damages arising out of the alleged violation of some other provision in the agreement.[7] The courts have consistently held that an employer may sue in court to recover damages for breach of a no-strike clause in disregard of a grievance procedure calling for final and binding arbitration of all disputes arising under the agreement.[8]

An arbitration award once rendered enjoys a greater degree of judicial support. When there is an agreement to arbitrate followed by an award, the legal situation is much the same as if the losing party had expressly promised to do the things directed by the arbitrator. An action for damages will lie for non-performance.[9] Where the award directs the losing party to take steps other than the payment of money and there is no good way of measuring in money the harm done by failure to comply with the award, the successful party can probably go to the equity court and secure a decree for specific performance. In an early Massachusetts case the court said:—"A submission is virtually a contract to do what shall be awarded, and there does not seem to be any reason why it is not as much a subject of equity, as if

[3] 4 Coke *81b–82a.

[4] First Ecclesiastical Church Society v. Besse, 98 Conn. 616, 621, 119 A. 903; Brown v. Leavitt, 26 Me. 251, 256; Boston & L. R. Corp. v. Nashua & L. R. Corp., 13 Mass. 463, 31 N.E. 751; Sherman v. Cobb, 15 R.I. 570, 10 A. 591; Sartwell v. Sowles, 72 Vt. 270, 48 A. 11.

[5] Pond v. Harris, 113 Mass. 114; Mead v. Owen, 83 Vt. 132, 74 A. 1058.

[6] Williston, Contracts (Rev. Ed.) § 1927A.

[7] First Ecclesiastical Society v. Besse, 98 Conn. 616, 621, 119 A. 903; Stephenson v. Piscataqua Fire & M. Ins. Co., 54 Me. 55, 71; Pearl v. Harris, 121 Mass. 390; Bowe v. Williams, 97 Mass. 163; Sanford v. Boston Edison Co., 316 Mass. 631 (1944); Sartwell v. Sowles, 72 Vt. 270, 48 A. 11. Presumably the New Hampshire and Rhode Island courts would follow these decisions.

[8] E.g., Colonial Hardwood Flooring Co., v. United Furniture Workers, 168 F. 2d 33 (4th Cir. 1948); Boston & Maine Transportation Co. v. Amalgamated Assn. of Street Rwy. Employees, 106 F. Supp. 334 (D. Mass. 1952).

[9] Bates v. Curtis, 21 Pick. 247; Williston, *loc. cit. supra.*

the contract were complete without the interference of an arbitrator."[10]

I have found no local cases in which an employer or union has invoked this remedy, but it is not unknown in other jurisdictions.[11] In one case the ILGWU had entered into a collective bargaining agreement with Philadelphia Waist and Dress Manufacturers Ass'n which contained a covenant that "no member of the Ass'n shall move his factory or factories outside of the city of Philadelphia during the life of this agreement." An arbitration clause called for submission of unresolved disputes to an impartial chairman. Goldstein & Levin moved away from Philadelphia. The union alleged that the agreement had been violated and presented the case to the impartial chairman who ordered the company to return its machinery to Philadelphia and reemploy its Philadelphia workers. The union then sought an order enforcing the award under the State Arbitration Act. The Court held that although the State statute was similar to the model arbitration statute adopted by New York and other jurisdictions, it was applicable only to awards which might be the subject of a judgment in an action *at law*. The court pointed out, however, that:—"In a proceeding by bill in equity the court can determine whether appellants were parties to the agreement between the Union and the Association containing the provision for arbitration, and can specifically enforce any award that the arbitrator may make thereunder to the extent to which it could compel specific performance had the award been contractually agreed upon by the parties themselves. If, as contended by appellants, it cannot decree that they must move their plant back to Philadelphia and there, over a given number of years, continue their capital investment, hire a certain number of employees, and carry on their business operations irrespective of the losses they may suffer thereby, it has at least the power, upon a proper showing, to enforce their obligation to the extent of a negative decree enjoining them from pursuing at any other place than Philadelphia the business which they conducted there when the agreement was entered into."[12]

The ruling in the Garment Workers case provides an adequate remedy for non-performance of all kinds of arbitration awards except two: (a) awards whose enforcement might require protracted supervision by the court, such as an award directing the equitable distribution of overtime, and (b) orders of reinstatement. Perhaps familiarity with reinstatement orders under the National Labor Re-

[10] Jones v. Boston Mill Corp., 4 Pick. 507 (1827).
[11] Sturges, Commercial Arbitrations (1930), § 303.
[12] Goldstein v. International Ladies Garment Workers, 328 Pa. 385, 196 Atl. 43.

lations and Fair Labor Standards Act, with the practices of arbitrators' and with the impersonality of industrial employment has eroded the old rule against specific enforcement of an employment contract to the point where the courts will direct reinstatement pursuant to an arbitration award. However, all that can be said on the basis of the present decisions is that the Supreme Judicial Court of Massachusetts recently reserved decision on the point while calling attention to the difficulty.[13]

Thus far we are speaking of an award which cannot be successfully challenged for some deficiency recognized by the courts. Ordinarily an arbitrator's decision is final on all questions of fact and law even though wrong.[14] Indeed an arbitrator has no obligation to apply the law even as he understands it[15] (although I should warn any arbitrators parenthetically that if you say that you are applying the law and misconceive it, the award is invalid).[16] The usual formula, therefore, is that an arbitration award will not be set aside except for fraud, corruption or a mistake so gross as to amount to fraud. There are, however, three other grounds for attacking awards which deserve careful consideration, partly for their intrinsic interest and partly because they lay the foundation for the discussion of possible legislation.

First, an arbitration award is invalid unless there was a fair hearing. A fair hearing includes notice of the time and place for hearing,[17] a reasonable time in which to prepare the case, and an opportunity to present evidence and argument. Those requirements are nearly always satisfied but there appears to be some carelessness and even confusion, if one may judge by the reported cases, about consulting experts after the close of the hearing. In Burns v. Thomas Cook & Sons, Inc.,[18] the State Board of Conciliation and Arbitration, with the assent of the parties, appointed experts to examine the company's financial status. The Board made an award, based partly on their

[13] Magliozzi v. Handschumacher, 327 Mass. 569, 99 N.E. 2d 856.

[14] J. F. Fitzgerald Construction Co. v. Southbridge Water Supply Co., 304 Mass. 130, 23 N.E. 2d 165; Motor Haulage Co. v. International Brotherhood of Teamsters, 272 App. Div. 382, 71 N.Y.S. 2d 352; Mack Mfg. Co. v. International Union, U.A.W., 368 Pa. 37, 81 A. 2d 562.

[15] West Jersey R. Co. v. Thomas, 21 N.J. Eq. 205; Publishers Assn. v. Newspaper and Mail Deliverers Union, 111 N.Y.S. 2d 725, 730–731.

[16] Boston Water Power Co. v. Gray, 6 Metc. 131; King v. Falls of Neuse Mfg. Co., 79 N.C. 360. In Sanborn v. Murphy, 50 N.H. 65 it was held that the rule applies only if it appears that the arbitrator intended his award to stand or fall upon the correctness of his application of the law. This is a sound qualification.

[17] McKinney v. Page, 32 Me. 513; Conrad v. Massasoit Ins. Co., 4 Allen 20; Wood v. Helme, 14 R.I. 325.

[18] Burns v. Thomas Cook & Sons, Inc., 317 Mass. 398, 99 N.E. 2d 856.

report, without notifying the parties that the report had been filed or setting the matter down for further hearing. Although the parties knew of the report and did not request a hearing in order to meet it, the court set aside the award because "the Board erred as a matter of law in receiving and considering the report of the experts without affording the defendants an opportunity to meet that evidence. . . ." Probably such decisions do not restrict the freedom of arbitrators to consult disinterested persons concerning general industrial practices and experience in similar situations, for it came to be recognized long ago that an arbitrator may seek advice in reaching his conclusion provided he makes his own decision.[19]

Second, an arbitration award is invalid if it does not make a complete disposition of the issues submitted. In a leading Massachusetts case the board of arbitration was called upon to decide "(a) what should be a fair rate of wages for the loomfixers, (b) what should be a fair work load for the loomfixers?" The award granted a 7% increase in wages and made various suggestions concerning the work load. The court held that the award was invalid because it failed to decide all the material questions submitted.[20]

One suspects that the awards held invalid upon this ground have resulted from ineptness in phrasing the decision more often than from reluctance to decide the case. In Magliozzi v. Handschumacher & Co.[21] the arbitrator was called upon to decide—

> Was the lay-off of H. H. proper under the terms of the contract? If not, to what remedies shall he be entitled?

The arbitrator filed the following award:

> Given the language of Article 12 [the seniority clause], it is hereby ruled that the lay-off of H. H. was improper. . . . The aggrieved employee is entitled to recovery of moneys lost by virtue of the improper lay-off.

The Supreme Judicial Court of Massachusetts stated that the award would have been invalid at common law because it made no ruling on H. H.'s claim to reinstatement but ruled that it would enforce the award because a 1949 statute (to be discussed below) modifies the doctrine forbidding enforcement of partial awards.

The Handschumacher case also passes upon another interesting

[19] See Sturges, Commercial Arbitrations (1930), pp. 498–500 where the cases are collected.
[20] Boott Mills v. Board of Conciliation and Arbitration, 311 Mass. 223.
[21] 327 Mass. 569.

point which has given some concern in arbitration of discharge cases. The award stated that H. H. was entitled to back pay but did not name a specific figure, leaving the computation to the parties. Although this is common practice under the National Labor Relations Act, it has sometimes been suggested that an arbitration award would be incomplete and therefore unenforceable if it left the computation to the parties. Fortunately the court has now squarely held that it is sufficient for the arbitrator to rule that the employee is entitled to damages for an improper lay-off, because the "computation of those damages, however constructive might have been the making of one by the arbitrator, is a legal consequence which need not be spelled out in the award."[22]

Third, and most important, an arbitration award is invalid at common law if the arbitrator undertakes to decide an issue which the parties have not agreed to submit to arbitration.[23] This is the doctrine which gives rise to the vexed problem of "arbitrability," which will be discussed at greater length in connection with experience under arbitration statutes. It is enough to point out here that the concept not only is simple but also is the inescapable consequence of the basic theory of judicial enforcement of arbitration awards. The theory is that the court is enforcing the contract made by the parties. The parties have promised to do whatever the arbitrator shall award upon certain defined questions. To require a party to do what the arbitrator awards on one of those questions is indeed to enforce the contract. To require a party to do what an arbitrator awards on a question which he did not agree to submit to arbitration would go beyond the contract and be beyond the power of the court. Basically, therefore, the question of arbitrability is simply a matter of interpreting the arbitration clause in the collective bargaining agreement. The courts cannot escape the task so long as the theory on which their assistance is invoked is that they are enforcing the parties' agreement.

State legislation. The statutes applicable to arbitration of labor disputes fall into three general groups. One is made up of the statutes creating conciliation, mediation and arbitration agencies for the purpose of handling existing disputes.[24] The second is composed of laws enacted by most States a good many years ago for the purpose of furnishing a procedure for the submission of controversies that would

[22] 327 Mass. at 572.

[23] Pratt, Read & Co. v. United Furniture Workers, 136 Conn. 205, 70 A. 2d 120.

[24] E.g., Conn. Gen. Stat. (1949) §§ 7379–7387; Maine Rev. Stat. (1944) ch. 25, § 12; Mass. Gen. Laws (1932) ch. 150.

otherwise be the subject of litigation in the courts.[25] Neither type has much application to the arbitration of disputes arising under collective bargaining agreements. Both contemplate special submissions rather than a general agreement to arbitrate a wide class of controversies that may arise in the future. Moreover, the general arbitration laws in the second category are often inapplicable to grievance arbitration because they cover only controversies which "might be the subject of a personal action at law or of a suit in equity."[26] In the leading Massachusetts case, Sanford v. Boston Edison Co.,[27] such a statute was held inapplicable to a collective bargaining agreement because it made no attempt to limit the arbitration to that class of controversies. The same objection would seem applicable to nearly all grievance procedures.

Of more importance are the arbitration laws applicable to future disputes clauses enacted after 1920 largely through the efforts of the American Arbitration Association. These statutes usually cover four main points:

First, it is expressly provided that an agreement to arbitrate any controversy thereafter arising out of a written contract "shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract."

Second, in the event either party fails to perform an agreement to arbitrate, the other party may apply for a summary order directing that the arbitration proceed. Such an order is to issue if the court is satisfied "that there is no substantial issue as to the making of contract or submission or the failure to comply therewith. . . ."

Third, a party to such a contract may obtain a stay of any action brought by the other party on an issue which they have agreed to arbitrate.

Fourth, a summary procedure is provided for the enforcement of an arbitration award. The award is final and binding unless (1) it was procured by corruption, fraud or other undue means or (2) there was evident partiality or corruption in the arbitrator.

There are wide differences in the scope of the statutes. Some, such as the Rhode Island law, explicitly provide that the statute "shall not apply to collective contracts between employers and employees."[28] The same exception was included in the New Hampshire statute

[25] E.g., Mass. Gen. Laws (1932), ch. 251, §§ 14–22.
[26] Mass. Gen. Laws (1932) ch. 251, § 14.
[27] 315 Mass. 631, 51 N.E. 2d 1.
[28] R.I. Gen. Laws (1938) ch. 475, § 1.

prior to 1945 but in that year the Act was amended to make it applicable to collective bargaining agreements if, but only if, the agreement "specifically provides" that it shall be subject to the statute.[29] The exception is not contained in the Connecticut statute,[30] which is clearly applicable to grievance arbitration.[31] Another group of State laws excepts "personal service contracts," "contracts pertaining to labor," or "contracts of employment," and a good deal of litigation has resulted. In Pennsylvania[32] and California,[33] for example, it is held that a collective bargaining agreement is not an employment contract and consequently agreements to arbitrate disputes arising under collective bargaining agreements are valid and enforceable under the arbitration laws of those jurisdictions. The federal statute[34] contains this exception but although the Supreme Court has not ruled on the point, the lower federal courts now uniformly hold that the exception makes the entire Act inapplicable to collective bargaining agreements.[35] Since State arbitration laws are treated as matters of procedure not applicable in the federal courts,[36] an agreement to arbitrate questions arising under a collective agreement is not a bar to an action in the federal courts under Section 301 of the Taft-Hartley Act; and this is true even though there is applicable State legislation.[37] It should be noted, moreover, that even if the Supreme Court were to reverse the lower court decisions upon the scope of the exception for "contracts of employment", the United States Arbitration Act would not provide a method for enforcing agreements to arbitrate because it covers only written provisions "in any maritime transaction or a contract evidencing a transaction involving commerce."[38]

Maine and Vermont have not enacted arbitration statutes applicable

[29] N.H. Rev. Laws (1942) ch. 415 as amended by Laws, 1945, ch. 191.

[30] Conn. Gen. Stat. (1949), §§ 8151 et seq.

[31] E.g. Pratt Read & Co. v. United Furniture Workers, 136 Conn. 205, 70 A. 2d 120; Colt's Industrial Union, Local 376 v. Colt's Mfg. Co., 137 Conn. 305, 77 A. 2d 301.

[32] Kaplan v. Bagrier, 12 Pa. D. & C. 693 ("personal service contracts").

[33] Levy v. Superior Court, 15 Cal. 2d 692, 104 P. 2d 770 ("contracts pertaining to labor").

[34] U.S. Arbitration Act, U.S.C. Tit. 9.

[35] Amalgamated Ass'n of Street Ry Employees v. Pennsylvania Greyhound Lines, 192 F. 2d 310 (3rd Cir.); Colonial Hardwood Flooring Co. v. United Furniture Workers, 168 F. 2d 33 (4th Cir.); Gatliffe Coal Co. v. Cox, 142 F. 2d 876 (6th Cir.).

[36] Boston & Maine Transportation Co. v. Amalgamated Ass'n of Street Ry Employees, 106 F. Supp. 334 (D. Mass.); cf. Shirtly-Herman Co. v. International Brotherhood of Hod Carriers, 182 F. 2d 806 (2d Cir.).

[37] See authorities cited n. 34 and 35 *supra.*

[38] 9 U.S.C. §§ 2, 4; see Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F. 2d 1004 (2d Cir.); San Carlo Opera Co. v. Conley, 72 F. Supp. 825, aff'd 163 F. 2d 310 (2d Cir.).

to future disputes. Here in Massachusetts the present state of our arbitration law defies description. In 1949 this cryptic bill was enacted:

> All provisions of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and enforceable by proper judicial proceedings.[39]

Obviously this simple declaration leaves a host of questions for judicial determination. The most likely meaning is that the old rule that agreements to arbitrate future disputes are revocable is no longer in force but that the common law applicable to arbitration awards once executed will continue to govern their status. Even this conclusion is doubtful, however, for in the only case under the statute the court enforced an award which would have been invalid at common law because it was not a complete disposition of the controversy.[40]

In summary, the law applicable to grievance arbitration in the six New England States stands in this posture: In all six States arbitration awards once made can be enforced, with some exceptions, by an action at law and probably by a suit in equity when damages would not be an adequate remedy. Maine, Vermont, Rhode Island and probably Massachusetts lack effective sanctions for the enforcement of agreements to arbitrate disputes arising under collective bargaining agreements, but Connecticut and New Hampshire have statutes as effective as those in any jurisdiction.

II

Before jumping to the conclusion that legislation is desirable in order to put legal sanctions behind the arbitration clauses of collective bargaining agreements, it may be wise to think a little about the experience of those States which followed the pattern of the New York Arbitration Act of 1920.

The most serious problem has been defining the respective roles of the arbitrator and the court. Usually the definition is made in terms of the power granted to the arbitrator under the agreement. Occasionally this question is raised with respect to the kind of relief that may be awarded; one may ask, for example, whether the usual

[39] Acts of 1949, ch. 548.
[40] Magliozzi v. Handschumacher & Co., 327 Mass. 569 (1951).

arbitration clause carries power to award damages against a union.[41] More often the issue is phrased in terms of "arbitrability." Modern arbitration statutes abolish the doctrine of revocability but in all other respects they proceed on the common law theory that the court's only function is to require the employer or union to perform its promise to submit certain kinds of questions to arbitration and, upon such questions, to do what the arbitrator awards. Section 1450 of the New York Civil Practice Act permits the respondent in a proceeding to compel arbitration to put in issue "the making of the contract or submission or failure to comply therewith." The same questions may be litigated on a motion to stay arbitration and, under some circumstances, on motions to confirm or vacate the award.[42]

In labor relations there is rarely any serious question about the making of the collective bargaining contract. The arbitrability of a particular dispute turns upon (a) the nature of the controversy and (b) the meaning of the arbitration clause in the collective agreement. There would seem to be no reason why the parties should not be permitted to agree that the arbitrator shall have power to make an award on these questions, thus making the question of arbitrability itself an arbitrable issue.[43] Indeed, as an original matter I should have supposed that the undertaking to submit to arbitration "any dispute, difference, disagreement or controversy of any nature or character" was certainly broad enough to cover disputes about the meaning of the arbitration clause and that the courts would reach the same conclusion under the narrower clauses which cover "differences as to the meaning and application of the provisions of this agreement." This view would seem to reflect the probable intention of the parties, would economize time and effort, since one nearly always has to hear the same facts on the question of arbitrability as on the merits, and would give the power of decision to the person most competent to decide wisely. Unfortunately the courts have followed a different approach. The current tendency is not only towards judicial definition of the jurisdiction of the arbitrator but towards increasing review of the merits of awards.[44]

[41] E.g. Publishers Ass'n v. Newspaper and Mail Deliverers' Union, 111 N. Y. Supp. 2d.

[42] N. Y. Civil Practice Act § 1458.

[43] Freydberg Bros. v. Corey, 177 Misc. 560, 31 N.Y.S. 2d 10; Rogers Diesel & Aircraft Corp. v. Amalgamated Local 259, 15 L.R.R.M. 848; Willesford v. Watson, L.R. 8 ch. App. 473; Matter of Kelly, 240 N.Y. 74, 147 N.E. 363.

[44] See generally Scole, Review of Labor Arbitration Awards, 17 U. Chi. L. Rev. 616; Summers, Judicial Review of Labor Arbitration or Alice through the Looking Glass, 2 Buffalo L. Rev. 1 (1952.)

One line of decisions is illustrated by Western Union Telegraph Co. v. American Communications Ass'n.[45] The critical issue before the arbitrator was whether the employees' refusal to handle struck traffic from cable companies was a violation of the "no strike" clause of the Western Union agreement. The arbitrator read the general words "there shall be no strikes or other stoppages during the life of this contract" in the light of industry practice and ruled in favor of the union. The New York Court of Appeals set the award aside on the ground that the arbitrator had exceeded his power under an arbitration clause which authorized him to resolve questions "—with respect to the application or interpretation of this contract" but which also provided that the arbitrator should not have "—the authority to alter or modify any of the express provisions of the contract." The assertion that the arbitrator had assumed the forbidden power to "alter or modify" the agreement is a rather transparent fiction. If you put one meaning upon a contract or statute and I am convinced that it has another, it is easy for me to say that you have distorted, and therefore "altered", the provision. In fact, we would both be interpreting the agreement. The sentence denying the arbitration power "to alter or amend any of the express provisions of this contract" has its counterpart in many collective agreements. Such clauses are the result of management's earlier fears that inexperienced arbitrators would feel free to make awards adding new provisions to the contract or doing justice in the face of an unambiguous provision. It was never the parties' mutual intention thus to transfer the interpretative function to the courts. Yet the reasoning in the Western Union case is found in other judicial opinions where the court strongly disagreed with the award.[46]

A second, parallel doctrine has developed for enlarging the judicial function in contract administration. The New York courts hold that ". . . the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. . . . If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."[47] Under this doctrine the courts decide whether a dispute is two-sided. If the judge thinks the grievance is frivolous, he

[45] 299 N. Y. 177, 86 N.E. 2d 162.

[46] E.g. Screen Cartoonists Guild, Local 852 v. Disney, 74 Cal. App. 2d 414, 168 P. 2d 982.

[47] International Association of Machinists v. Cutler-Hammer, Inc., 297 N. Y. 519, 74 N.E. 2d 464.

stays the arbitration thus making the only effective decision of the dispute.

Thus far the practice of staying the arbitration of a case which the judge regards as one-sided has been confined to New York but it reveals an attitude which has counterparts in other jurisdictions. In Colt's Industrial Union v. Colt's Manufacturing Co.[48] the labor organization sought to compel the employer to arbitrate the question whether laying off employees and assigning their work to supervisors violated the recognition and seniority clauses of the collective agreement. The arbitration clause covered disputes "as to the application of the terms of this agreement." The court held that it was for the court, not the arbitrator, to decide whether these clauses were applicable, saying:

> "The plaintiff contends that the agreement to arbitrate differences as to the "application" of the terms of the agreement includes arbitration of differences as to "interpretation", and that the parties agreed thereby to submit to arbitration the question whether any term of the agreement has application to a dispute. The contention is untenable. It is not uncommon for parties to arbitration agreements to confide to arbitrators the decision of legal as well as factual disputes. When this occurs, arbitrators have authority to interpret the agreement. *Liggett* v. *Torrington Building Co.*, 114 Conn. 425, 430, 158 A. 917; *Application of Westinghouse Air Brake Co.*, 166 Pa. Super. 91, 70 A. 2d 681. When, however, the agreement does not so provide, its interpretation is a function of the court. *B. Fernandez & Hnos., S. en C.* v. *Rickert Rice Mills, Inc.*, 119 F. 2d 809, 814. Arbitration proceeds from the voluntary action of the parties and "No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness." *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 299, 169 N.E. 386. Here the parties have limited arbitration to differences as to the "application" of the terms of the agreement, and they are bound by the limits they have themselves fixed. *Pratt, Read & Co.* v. *United Furniture Workers*, 136 Conn. 205, 209, 70 A. 2d 120. The legal question was whether the dispute involved the application of any provision of the agreement. The court was not in error in

[48] 137 Conn. 305, 77 A. 2d 301.

> accepting the responsibility of answering it. *Robinson* v. *National Fraternal League,* 81 Conn. 707, 710, 71 A. 1096; *Matter of Belding Heminway Co.,* 295 N.Y. 541, 543, 68 N.E. 2d 681."

Undoubtedly the *Colt's* litigation could have been avoided by more careful draftsmanship; the court's opinion intimates that its ruling would have been different if the arbitration clause had covered "differences concerning the *interpretation* and application of this agreement." The Western Union case doctrine also may disappear upon more careful analysis of the purpose of various provisions in arbitration clauses. The rule permitting only "two-sided disputes" to be arbitrated is more troublesome, for it would be hard to write a more explicit contract than one calling for the arbitration of all disputes of any character, but even this doctrine could be sterilized by stipulating in the collective agreement that "Any arbitrator appointed hereunder shall also have power to make a final and binding ruling upon the arbitrability of any issue."[49]

Nevertheless the decisions are disturbing as symptoms of judicial distrust for labor arbitration. Behind each rationale apparently lies a desire to review the work of the arbitrator for the purpose of preventing or reversing decisions that the courts think wrong. Among lawyers and judges there is also a wide-spread belief that arbitrators make expedient compromises instead of rational decisions. Some people may see in this simply another example of judicial hostility towards organized labor. Others will put it down to the same jurisdictional jealousy which the common law courts felt towards Equity and with which judges greeted administrative agencies. While this distrust persists, there are bound to be rough edges in the joints between labor arbitration and the surrounding legal machinery.

Despite the influence of these factors the fundamental source of the judicial tendency to review labor arbitration awards may lie somewhat deeper. Wherever there is statutory provision for the enforcement of arbitration agreements and arbitration awards, the courts are called upon to put the sanction of law behind the decision of the arbitrator. It is certainly a natural reaction—perhaps it is inevitable—for a judge to balk at lending the assistance of the judicial process to the enforcement of an award which he considers unconscionable or capricious. The parallel problem which arose in defining the scope of judicial review of administrative action was re-

[49] My belief that such a clause would be effective is based on the authorities cited in note 42 *supra.*

solved against judicial abdication and in favor of permitting the judge to ask whether, on the record of administrative action, he could conscientiously enforce the dictate of the administrative agency.[50] Although we may hope that the scope of judicial review of arbitration awards will never be as broad as review of administrative action, it is important to realize the degree to which judges feel that they are required to stultify themselves if their sole function is to rubber-stamp arbitrary decisions by another, unofficial tribunal.

Closely akin to this feeling is the belief that one man should not have absolute power of decision. Appeals have become a conventional, although not traditional part, of the legal system. The more often the decision is reviewed the less is supposed to be the possibility of mistake. Hence, both laymen and lawyers often conclude that there should always be at least one opportunity to appeal any decision. I do not mean to imply that these considerations adequately support the Western Union and Cutler-Hammer doctrines. They are important, however, in making a choice between the old common law rules of non-enforcibility and the framing of new legislation. If some measure of judicial intervention is the inevitable price of judicial assistance, a statute providing for judicial enforcement of arbitration awards and agreements to arbitrate will inevitably stir up litigation by dissatisfied parties and result in a number of decisions quite contrary to the results of the arbitration process. And perhaps the awareness that the parties are free to disregard too unacceptable a decision exerts a more salutory check on the arbitrator than fear of judicial scrutiny.

Whether these costs of legislative sanctions would be outweighed by the benefits depends upon the extent to which legal sanctions are necessary to the effectiveness of grievance arbitration. It is difficult to make an accurate appraisal but casual observation leads me to the conclusion that in the overwhelming proportion of cases employers and labor unions accept arbitration in good faith and scrupulously comply with arbitration agreements and awards. Yet for a few years longer we will be unable to rely on honesty and good will as the sanction for all undertakings and the absence of a statutory remedy allows any party with preponderant economic power to disregard the grievance procedures if he chooses. If a decline in business activity should reduce the economic power of unions, more companies might succumb to the temptation to refuse to arbitrate doubtful cases. Conversely, it is not outside the realm of possibility for a union with a

[50] Universal Camera Corp. v. NLRB, 340 U.S. 474.

strangle hold on a business to assert its economic power in disregard of the agreement.

Assuming that a new statute were to be enacted, it should embody a number of changes curtailing the scope of judicial review and defining more clearly the relationship between arbitration and the courts. In my judgment the major points to be covered are these:

(1) The common law rule of revocability should be overturned.

(2) The courts should be denied power to intervene in the arbitral process, or to stay the proceeding, prior to the time the complaining party has developed his case before the arbitrator—the forum in which both parties agreed it should be developed—and the arbitrator has made his decision. The chance that an arbitrator will exceed his power or make a bad mistake is too small to justify judicial interference before the contract grievance procedures have been completed. The suggested rule is similar to the doctrine that one must exhaust his administrative remedies before seeking judicial assistance. Nor is there any occasion to give the party who wishes to arbitrate a right to seek judicial aid at this stage of the proceeding. If one party is recalcitrant, let the other proceed *ex parte* before the arbitrator with all questions of jurisdiction reserved.

(3) Provision should be made for staying any action at law or suit in equity upon an issue covered by the arbitration provision.

(4) All awards, including awards of reinstatement with or without back pay, should be enforceable by expeditious process. An award should be final if the arbitrator has stayed within the powers delegated to him by the collective bargaining agreement, unless it is tainted by fraud, corruption or the denial of a fair hearing. Whether the hearing was fair should be judged by broad constitutional standards of due process and not for conformity to the technicalities of judicial process.

(5) There should be an express provision that an arbitrator may rule upon questions of arbitrability at least in a preliminary fashion. I would also create a statutory presumption that the familiar arbitration clauses empowering an arbitrator to decide disputes "concerning the interpretation or application of this agreement" shall be deemed to carry power to make a final and binding decision on the meaning of the arbitration clause itself; in other words, the arbitrator should be presumed to have power to make a final decision on the question of arbitrability. But the rule should establish only a presumption which could be overcome by an explicit statement that the

parties agreed to reserve final judgment on this issue for the courts. The underlying considerations of policy are sufficiently strong to justify a bias in favor of finality, but they are insufficient, in my judgment, to create a rule of law restricting the parties' freedom in negotiation.

A final problem cannot be resolved by statutory provisions. Arbitrators frequently were called upon to decide some issues which on another occasion might be raised in court. The converse proposition is also true. Courts are sometimes called upon to decide issues which on other occasions come before arbitrators and which arbitrators on the whole seem more fitted to decide. Success in fitting arbitration into the legal framework therefore would seem to require not only definition of the respective jurisdictions of the court and arbitrator but also the evolution of some basic principles which would command general acceptance. The absence of such a common understanding may also explain the New York decisions that I have criticized. Arbitrator Meyer's ruling in the Western Union case was consistent with decisions by other distinguished umpires.[51] Much the same argument could be made in support of the union's position in the Cutler-Hammer case even though the court regarded it as so unconscionable as to stay the arbitration proceeding.[52] The explanation cannot be that all these arbitrators were guilty of egregious errors nor am I quite willing to conclude that the courts have been consistently seeking to substitute their judgment for that of the arbitrators under the pretense of finding that the arbitrator was clearly wrong. Is not the explanation that the arbitration process is proceeding on one philosophy of decision and the courts upon another? The underlying problem—which must wait till another day—is to bring these philosophies closer together.

[51] American Tel. & Tel. Co., 2 A.L.A.A. par. 67,000; Waterfront Employers Ass'n, 9 Lab.Arb.Rep. 5.

[52] Bond Clothes, Inc., 7 Lab.Arb.Rep. 708; Velvet Textile Corp. 7 Lab.Arb. Rep. 687.

Dean Roscoe Pound
on
The American Arbitration Association

The Journal is proud to publish the following letter from Roscoe Pound, Esq., Dean Emeritus of the Law School of Harvard University, dated February 11, 1953, in reference to the dismissal of the lawsuit against the Association by the District Court in Omaha, Nebraska, on February 7, 1953.

I am glad to know that the suit for an injunction against the American Arbitration Association brought in Omaha under a resolution of the Nebraska State Bar Association has been dismissed. This suit charged the American Arbitration Association with usurping the judicial power and jurisdiction of the courts of Nebraska and of unlawfully practicing law.

As this suit received not a little notice in the press and has given rise to some question as to the nature and work of the American Arbitration Association, it has seemed proper for me to make some statement with respect to it.

I was asked by the American Arbitration Association to testify by deposition in the case and was prepared to do so. I am advised, moreover, that Judge Henry W. Goddard of the United States District Court; Presiding Justice David W. Peck of the Appellate Division of the New York Supreme Court; David L. Cole, Director of the Federal Mediation and Conciliation Service; John W. Davis, former President of the American Bar Association; Whitney North Seymour, former President of the Bar Association of the City of New York; John G. Jackson, formerly Chairman of the Committee on Ethics of the American Bar Association; Sylvan Gotshal, Chairman of the Arbitration Committee of the New York City Bar Association; and John F. Sembower, former Chairman of the Committee on Unauthorized Practice of the Chicago Bar Association, were among a number of others who were prepared to be witnesses for the Association.

For more than twelve years I was a Director of the Association, and I have been familiar with its activities since its organization in 1926. I should have been glad to have an opportunity to testify for the Association since it is doing notable service and its efforts in promoting arbitration and making facilities for arbitration available should be furthered rather than discouraged.

Certainly the Association is not in any way usurping the powers of the courts nor practicing law. As to usurpation of judicial power, there was at one time some jealousy of agreements to arbitrate whether agreements to submit the existing dispute (the so-called submission

agreement), or an agreement to arbitrate a future dispute arising out of a contract (the so-called arbitration clause). It was considered that such agreements tended to oust the courts from their jurisdiction, but long ago this attitude was given up. Indeed, as one court has put it, the resulting rules had an "unworthy genesis" and stood rather upon antiquity than upon excellence or reason. Forty-six states including Nebraska now have statutes giving full effect to arbitration agreements. Indeed, the statute in Nebraska provides that any two citizens may agree to submit a dispute to any other third person for final determination, and that an agreement to do so after a dispute has arisen is legal and binding and will be enforced by the courts. It is therefore an anachronism in Nebraska to speak of arbitration as ousting the jurisdiction of the courts.

Nor is there any more reason for charging that the American Arbitration Association is practicing law. There are three types of lawyer, the agent for litigation (attorney), the advocate, and the legal adviser or counsellor. The Association in no way performs any of these functions or does anything which can fairly be referred to them by analogy. What it does is to provide lists of business and professional men, many of them leaders of the bar in their communities, who stand ready to serve as arbitrators when voluntarily selected by the parties to disputes, and to provide facilities for arbitration.

It has become a national practice, if not a policy, that disputes arising out of labor-management collective bargaining agreements should be submitted to arbitration and thus strikes and lock-outs avoided. It is obvious that such a policy requires implementation. Its practical realization makes it necessary to provide arbitrators and other facilities for the prompt determination of such matters. The Association's education program is well known.

Business men all over the world have long believed it wise to submit many of their controversies to arbitration by professional and business men familiar with trade practices and customs, rather than have them determined by a jury of persons not thoroughly acquainted with such practices.

The American Arbitration Association since its inception has had the full cooperation of bar associations throughout the country. Lawyers have realized that arbitration offers another field in which they may be active and render services to their clients. The report of the Bar Association of the City of New York, where arbitration has made the greatest progress, shows that in over ninety per cent of the cases in which recourse is had to facilities provided by the American Arbitration Association lawyers represent clients and take part in the proceedings.

The Lawyer's Function in Arbitration

Sylvan Gotshal

Chairman of the Committee on Arbitration of The Association of the Bar of the City of New York

Ever since the first modern arbitration statute was passed in the United States (New York, 1920), what place a lawyer should have in an arbitration proceeding and the effect of arbitration on the practice of law, have been storm centers of controversy. First debated abstractly, the issues now are being faced in terms of the practicalities with which most lawyers are concerned. The basic issue is whether or not arbitration can be a procedural as well as financially successful adjunct to the lawyer's practice. The thirty years of arbitration experience had by the New York Bar may well serve as a helpful guide to practitioners throughout the United States in their consideraton of the subject.

To view the problems, it would be well to first list, and then analyze the functions in arbitration which lawyers now serve. The functions are four: lawyers serve as practitioners, as arbitrators, as arbitration executives and as archietects of arbitration law.[1] In the latter two functions the lawyer is secure. The place of the lawyer as an arbitration practitioner and as an arbitrator, however, is not settled, and it is with these that this paper is primarily concerned.

As Practitioners

As an arbitration practitioner, the lawyer has three duties: drawing contracts or submission agreements providing for arbitration of future or existing disputes, counselling his client after a dispute has arisen, and preparing for and participating in hearings. The decision to use an arbitration clause is not always a simple one.[2] Counsel must regard as paramount his client's interests and it may be felt that the very benefits of arbitration will run against him. To decide, the careful lawyer must study the relationship between the contracting parties and gauge the effect on this relationship of market fluctuations and other business variables. He must weigh the possible publicity and possible antagonism of court appearances against the privacy and amicableness of the arbitration tribunal. He must analyze the potential disputes with an eye to the nature of those disputes. Will it call for expert testimony? If so, arbitration, with its possi-

[1] Gotshal, *The Lawyer's Place in Arbitration.* 1 Arbitration Journal (N. S.) 367 (1946).

[2] Phillips, *A Lawyer's Approach to Commercial Arbitration,* 44 Yale Law Journal 31 (1934).

bility of an expert arbitrator and its absence of barriers created by the rules of evidence, is the answer. Will it be such that delay will prejudice his client? Benefit him? Nowhere is the lawyer more on his mettle. The job is one for which he alone in the business world is trained, and it is one which is concededly his.

What counsel a lawyer may give his client after a dispute has arisen depends upon the answers to several questions. Are the parties obligated by their contract to arbitrate their disputes? If they are, is this dispute an arbitrable one within the meaning of the arbitration agreement used by the parties. If the parties are not obligated to arbitrate, should arbitration be employed here? Should it be rejected in favor of compromise, litigation or just letting it pass? If it is found that the parties are bound by the terms of their agreement to arbitrate their disputes, or if arbitration is agreed upon as the dispute settling method, the lawyer is presented with a task of a different nature—and one of fundamental importance—the selection of arbitrators. Much has been said and written elsewhere about the techniques here involved. Perhaps the best preparation for this function lies in the lawyer's gradually acquired experience in assessing human nature and assessing, equally, the nature of the dispute.

Proper performance of the lawyer's role at the arbitration hearing involves further selection—this time a selection of certain techniques and skills from among those of the good courtroom lawyer. More importantly, it involves a rejection of techniques unsuited for the arbitration tribunal. Far too many lawyers who participate in arbitrations seem to feel that a tribunal is merely a courtroom wherein counsel is permitted to sit comfortably and smoke while battling with his arsenal of technical legal weapons. Far from it. Counsel must never forget that he is keeping company with experts. He must be more than a mere legal technician, he must be himself an expert, and a psychologist. While arbitration is commended for the comparatively negligible amount of paper work needed, experienced arbitration counsel know that they must prepare as meticulously to face arbitrators as to face judges.[3] The rules of courtroom procedure become second nature to a lawyer, discipline is imposed and is automatic. Arbitration, on the other hand, calls for self-imposed discipline of the most rigorous nature, discipline severe enough to permit, if need be, the introduction without objection of totally irrelevant

[3] *Ibid.*, p. 51.

evidence, or to admit weaknesses in a client's case. Arbitration is simple, and simplicity is a virtue often difficult for a lawyer to achieve. The arbitration practitioner must never forget that, of its many values, the most important that arbitration offers is the amicable nature of the proceeding. Litigation often makes permanent enemies of the adversaries, after arbitration they almost invariably continue to deal with each other.[4] Differences are *settled* by arbitration, not merely adjudicated. The lawyer must shape his tribunal behavior to that end. He should restrict his questioning of disputants and witnesses to a minimum, and when he does interrogate, should never attempt to hold the witness to "yes" or "no" answers. The parties and the arbitrators should at no time be given the impression that they are being misled by foolish tactics or irrelevant questioning. Counsel's technique should be one which uncovers the facts as quickly and straightforwardly as possible. Exhibits, too, should be kept to a minimum, and should not be submitted without an accompanying summary or explanation of their import. Opening and closing statements should not be lengthy, verbose or embittered. A short statement of the issues and a word or two as to the client's complaint or defense is always ample. Fundamentally, the lawyer owes his client and the tribunal a factual, informal and respectful presentation of one side of the dispute. The lawyer's chief contributions to fair, easy and expeditious hearings are his training in the marshaling and presentation of facts;[5] his capacity for judging the veracity of a witness' testimony and his companion ability to expose its inconsistencies and untruths; and, more generally, the wisdom and judgment that come with practice. That these are also the main attributes of a successful courtroom practitioner should occasion no surprise, it merely indicates that good lawyers are good lawyers, whatever the tribunal.[6]

[4] See Fortune Magazine, December, 1938, p. 89.

[5] Howlett, *The Lawyer's Function in the Field of Labor Relations.* 20 Tenn. L. Rev. 137 (1948).

[6] Arbitration awards may be confirmed when necessary (see, for example, New York Civil Practice Act, Sec 1461). There is also the possibility that the award may be contested (C.P.A. Secs. 1458, 1460, 1462 and 1462 (a) and the decision of the Court thereon appealed from (C.P.A. Sec. 1467). This motion and appeal practice is, of course, another province of the lawyer. A valuable aid to the practitioner thus engaged may be found in *Arbitration Law, A Quarterly Digest of Court Decisions,* published by the American Arbitration Association.

As Arbitrators

Lawyers, through participation as arbitrators, perform an invaluable service in the amicable and efficient settlement of disputes by arbitration. A surprisingly high percentage of American Arbitration Association panel members are of the legal profession.[7] Equipped by experience for skillful fact analysis, lawyers are also, of course, equipped by their training to decide questions of law. The combination is an excellent one for any arbitrator.

As Arbitration Executives

As members of committees and as administrative executives, lawyers have labored long with arbitration associations and systems. They pioneered in legislation rendering arbitration contracts and awards enforceable. They led, too, in the founding of the American Arbitration Association as well as other bodies administering arbitrations. They lead now in the promulgation and revision of rules, standards and Codes of Ethics.[8]

As Legal Architects

A better known contribution of the legal profession to the establishment and continuing development of arbitration has been its fulfillment of an architectural function. Ancient though arbitration may be, it enjoyed a late surge into popularity—or at least into popular discussion—in the last thirty years, due to the conscious efforts of a few determined men and women who sought a new answer to old questions. Chief among this group were lawyers—running the gamut from newly-admitted members of the Bar to its elder statesmen and including judges of unexcelled stature.[9] The efforts of these men and women and their many successors have not been limited to legislative enactments. They have embarked on a program of education through the bar associations, the law schools, and the

[7] American Arbitration Association: Lawyer arbitrators in commercial arbitrations—21%; Lawyer arbitration in labor arbitration—61%; Lawyer arbitrators in accident arbitrations involving statutory claims—100%; from the report of the Committee on Arbitration, Association of the Bar of the City of New York, 3 The Record of The Association of the Bar of the City of New York 155 (1948).

[8] Kellor, *Arbitration and The Legal Profession* 45 (1952).

[9] See Kellor, *American Arbitration,—Its History, Functions and Achievements* (1948).

legal journals,[10] which has resulted in the addition to and improvement of, a new technique in the equipment of the rank and file of the profession.

Moreover, in those infrequent occasions when arbitration has come under attack, the foremost members of the Bar have been ready to defend it. Quite recently in a suit against the American Arbitration Association, the Association was charged with usurping the judicial power and jurisdiction of the courts of Nebraska and of unlawfully practising law. The suit was dismissed on the motion of the Nebraska State Bar Association, but prior to its dismissal, the following noted members of the Bar had indicated that they were prepared to be witnesses for the Association: Judge Henry W. Goddard of the United States District Court; Presiding Justice David W. Peck of the Appellate Division of the New York Supreme Court; David L. Cole, formerly Director of the Federal Mediation and Conciliation Service; John W. Davis, former President of the American Bar Association; Whitney North Seymour, former President of the Association of the Bar of the City of New York; John G. Jackson, formerly Chairman of the Committee on Ethics of the American Bar Association; John F. Sembower, former Chairman of the Committee on Unauthorized Practice of the Chicago Bar Association. Dean Roscoe Pound of the Law School of Harvard University wrote the Association about this suit, stating in part in the letter printed elsewhere in the Arbitration Journal:

> "I should have been glad to have an opportunity to testify for the Association since it is doing notable service and its efforts in promoting arbitration and making facilities for arbitration available should be furthered rather than discouraged."

That the continuing effort to develop arbitration through various means has had its effect is evidenced by the favorable attitude adopted by the courts toward arbitration in recent years. One Court has found itself and other Courts obligated "to shake off the old judicial

[10] See, inter-alia, symposia in: 83 U. of Pa. L. Rev. 119, (1934); 17 N.Y.U.L.Q. 495 (1940); 13 Missouri L. Rev. 131 (1948); 24 Temple L.Q. 107 (1950); 17 Law and Contemporary Problems 471, 631 (1952).

hostility to arbitration."[11] The Supreme Court of Iowa, e.g., has stated: "The settlement of civil disputes by arbitration is a legally favored contractual proceeding whose object is to speedily determine the matter by tribunal chosen by themselves, and thereby avoid the formalities, delay and expense of litigation in Court."[12] The Courts of many other States have announced similar support for arbitration.[13]

The Right to Representation by Counsel

The foregoing portion of this article should suffice to indicate that the lawyer has a real place in arbitration. Moreover, it should also be clear that arbitration has a real place among the lawyer's useful techniques. The question of whether an arbitration tribunal is a proper place for a lawyer to be seen[14] is a stale topic. Lawyers are in fact seen—and increasingly often—in arbitration hearings.[15] The debate as to the lawyer's role has continued, however, on a different question, namely: Have parties to a dispute due to be arbitrated a right to representation by counsel and if they do, how and when can that right be lost or given up?

In New York this important question has been hotly contested by reason of the several attempts of the State Legislature to enact what is popularly known as the Gans Bill[16] and its analogues.[17] The writer believes that a study of the Gans Bill and its history is essential for all practitioners, wherever located, who are interested in arbitration,

[11] *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.,* (C.C.A. 2nd, 1942), 126 F. 2d 978, 985.

[12] *First National Bank in Cedar Falls v. Clay,* 231 Iowa 703, 713 (1942).

[13] See: *General Exchange Insurance Corporation v. Harmon,* 157 S.W. 2d 126 (Kentucky, 1941); *Housing Authority of New Orleans v. Henry Ericsson Co.,* 2 So. 2d 195 (Louisiana, 1941); *Knickerbocker Textile Corp. v. Sheila-Lynn, Inc.,* 16 N.Y.S. 2d 435, aff'd, 20 N.Y.S. 2d 985 (New York, 1940); *Bryson v. Higdon,* 21 S.E. 2d 836 (North Carolina, 1942); *Knutson v. Brazoria County,* 170 S.W. 2d 843 (Texas, 1943).

[14] See the prolonged exchanges in the editorial and epistolary columns of New York Law Journal for the following dates: 6/19/22 (J. Noble Hayes); 5/25/23 (Judge Lauer); 5/26/23 (Julius H. Cohen); 3/10/25 (Judge Grossman); 3/12/25 (I. M. Levy); 8/5/25 (Judge Guy); 10/8/25 (H. H. Nordlinger); 11/20/25 (Judge Guy); 5/1/30 (Edward L. Garvin); 5/21/30 (Ferdinand H. Pease); 6/19/31 (Editorial).

[15] See, for the increase of from 36% of lawyer participation in 1926–27 to more than 91% in 1947, Report, *supra,* n. 7, p. 156.

[16] 18th Annual Report of the Judicial Council of the State of New York, page 57 (1952).

[17] 17th Annual Report of the Judicial Council of the State of New York, page 218 (1951); 16th id., page 89 (1950); 15th id., page 52 (1949).

because New York's attempt to legislate on the question of the right to counsel in arbitration proceedings, may well provide a check list of "do's" and "don't's" for other States considering the problem. Finally signed by Governor Dewey in April of 1952 and effective September 1, 1952, Section 1454 of the New York Civil Practice Act is amended to read in significant part as follows:

> "No waiver of the right to be represented by an attorney in any proceeding or at any hearing before an arbitrator shall be effective unless evidenced by a writing expressly so providing signed by the party requesting such representation, or unless the party fails to assert such right at the beginning of the hearing."

Without at first commenting upon the principle involved, it is apparent that the text contains several structural weaknesses which may render it quite difficult in practice, and which might dispose even an observer partial to its underlying principle to recommend tighter drafting.

First, the right with which the statute is concerned is inadequately defined. It is presented negatively, and its limits are not clear. To whom does the right to representation belong? At what times may representation be waived? It appears from the wording that the right to representation is one belonging only to a "party requesting such representation". If this is so, then the Act betrays its history and purpose, since apparently the right was intended to belong to *any* party whether or not he had actually requested representation. May this right be waived at the time the parties enter contractual relations, before the occurrence of a dispute, or only when the parties have found themselves in an actual controversy? The statute provides no clear indication. At least one vaguely feels that it is the latter—upon the occurrence of a dispute, but legislative and pre-enactment history argue against it.[18]

Second, what constitutes a "writing expressly so providing"? Must it be a formal document containing all of the elements of a legal waiver? May it be a sales contract which has been signed by the parties, embodying among its many fine-print clauses a waiver

[18] See 17th Annual Report, *supra*, note 17, pp. 218 to 220.

of the right to representation by an attorney? May it be a large-print specially signed waiver provision in a sales contract? All that is clear is that the previous practice in many trades of using a form contract containing merely an agreement to abide by the arbitration rules of an association, which rules contain a waiver of the right to representation by counsel, seems to be proscribed. The Act was apparently passed to remedy such waiver by reference to a set of rules.

Third, who or what is a "party requesting such representation"? Literally read, the words indicate that in order for a waiver to become effective, a party must (1) request representation, (2) be persuaded out of it, and (3) evidence this by a signed document. To include a requisite of active insistence upon counsel is to limit sharply the scope of the Act. Further, to whom should such a request be made? There are as many different rules regarding representation as there are bodies administering arbitrations. Only a few of these[19] call for a request upon the arbitrator and/or the other party to the dispute as a prerequisite to the participation of counsel. Again, the statute gives us no help.

Fourth, the Act does not specify what constitutes such an assertion as will save the party his right to representation. Unless improvement follows in this respect, much litigation will surely arise from attempts by losing disputants in arbitration to show an assertion of the right to counsel on their part, within the meaning of the section.

In view of these evident weaknesses, it is unfortunate that the bill was enacted in its present form. A 1949 bill[20] was rendered patently unacceptable by its failure to provide for waiver, in any way, of the right to representation. A 1950 bill[21] was also unacceptable because it did not allow for waiver through failure to insist upon the right at the beginning of the hearing. There are some, however, who think the 1951 recommendation[22] was a commendable (although far from perfect) draft—and definitely better than the enacted Gans Bill. It read: "A party shall have the right to be represented by an attorney in any proceeding in the arbitration or at any

[19] For example, National Federation of Textiles, Inc., Arbitration Rule 17.
[20] 15th Annual Report, *supra* note 17, pp. 52, 53.
[21] 16th Annual Report, *supra* note 17, pp. 89, 90.
[22] 17th Annual Report, *supra* note 17, pp. 218–220.

hearing before the arbitrator and such right may not be waived except by a signed writing waiving such with respect to an existing controversy expressly and not by reference, or by failure to assert such right at or before the beginning of the proceeding or hearing." This rejected amendment contains several points of structural interest, again apart from principle. First, the right to representation is positively and definitely expressed. It belongs to a party in an existing controversy, and it follows, of course, that it may be waived only after the controversy has arisen. Second, the nature of the waiver is expressed, and we are told that the signed writing must in so many words state that the right of representation in an existing controversy is being waived. Moreover, since waiver can only be effective as regards an existing controversy, it is clear that anything stated or implied in a writing between the parties before the occurrence of the dispute is of no effect. A party unequivocally renouncing his right to be represented by an attorney in a commercial or labor contract between the parties would have given away nothing in New York under this proposal. Third, the 1951 proposal was guilty of the same inadvertence as regards the meaning of "assert" as is that which has been enacted as law[23]. The phrase "at or before" also is loose drafting.

In the dispute as to whether or not there is a right to representation by counsel in arbitration, lawyers have been, in general, the protagonists. Leaders of commercial enterprises using arbitration to end their disputes have often been the antagonists. It is impossible to find one view or the other wholly wrong or wholly right. The issue does not lend itself to blacks and whites.

The opposition to the Gans Bill and its analogues argue along these lines: The Bill is aimed at the rules of certain trade associations which are incorporated by reference in commercial contracts, wherein the parties agree to submit all controversies arising under the contract to such an association and to abide by that association's rules,[24] which rules restrict the right to be represented by counsel[25] or forbid it

[23] Section 1454, N.Y.C.P.A.

[24] For example, the following clause recommended by the Association of Food Distributors: "Any controversy or claim arising out of or relating to this contract or breach thereof shall be settled by arbitration in New York, N. Y., by the Association of Food Distributors, Inc., in accordance with its rules, then obtaining, and judgment may be entered upon the award."

[25] National Federation of Textiles, Inc., Arbitration Rule 17.

absolutely[26]. If parties choose to contract away their rights to representation by counsel in order to obtain the benefits arbitration offers, why should they be forbidden to do so?

The proponents in rebuttal point out that often one or both of the parties are unaware of the "no-representation" provision when they contract, since they do not always know the content of the rules referred to in the contract. Or, even if both parties do know of such a provision in the rules referred to in the contract, often a large business organization in an industry will force on a smaller supplier or customer a form contract including such a provision. If the small supplier or customer objects, the large business organization may refuse to deal with him. In such cases the prospective waiver of representation by counsel is actually being coerced from one of the parties.[27] Finally, even if the parties so contract willingly, it is impossible to foresee all possible disputes,[28] some of which may be definitely better handled by counsel.

Opponents of the law answer that both parties are usually familiar with the contents of the rules to which they agree, since generally they are the rules of a trade association in which the contracting parties are active members. And even if a form contract is at times forced upon one party by the other, this is no more than frequently happens in the business world with other clauses and other contracts.[29] As to foreseeability, the disputes which do arise under such a clause may not all be suited, from one party's view, to arbitration, but such is the risk the party takes when he agrees to arbitrate in the first instance. It is equally so of the right to representation, the waiving parties take a calculated risk.[30]

[26] Association of Food Distributors, Inc., Arbitration Rules, Section 7 (3).

[27] See Phillips, *supra* note 2, p. 40.

[28] See 17th Annual Report, *supra* note 17, pp. 218–220: ". . . a waiver in anticipation of a controversy which may never arise or the nature of which cannot be foreseen is unrealistic and a practice which may be as much abused as that which the present proposal is intended to correct . . ."

[29] For example, the standard lease forms of many real estate boards, which tenants must accept if they want a roof overhead.

[30] With this view I am strongly inclined to agree. I see no valid reason why parties should not be allowed to sign a specific and patent (as opposed to referential) waiver, if they desire. The specificity of the waiver would accord the spirit of the Gans Bill. Moreover, to permit such waivers to be obtained only after a dispute arises, will probably prevent arbitration hearings from ever being held without counsel; and there do indeed arise occasions when counsel may hinder rather than help. The businessman is no stranger to calculated risks. If it is made clear what is at stake, he should be allowed to risk a prospective waiver.

The arguments against the Bill which cut deepest, however, go to the nature of arbitration itself. In a rent Bar Association symposium,[31] these objections were ably voiced by Mr. Walter Ross, President of the Textile Distributors Institute, Inc., Mr. Leo M. Cherne, Executive Director of the Research Institute of America, Mr. Henry Andreini, former director of the Association of Food Distributors, and Robert R. Bruce, Esq.[32] Mr. Andreini phrased these objections as follows: "The indispensable values of commercial arbitration . . . (without counsel) . . . are chiefly these: 1. It is expeditious. 2. It is inexpensive. 3. It is amicable . . . "all too frequently the presence of counsel invites an introduction of legal technicalities and maxims which tend to confuse the proceedings.[33] ". . . Another difficulty is . . . pre-arbitration delays . . . "it cannot be emphasized too strongly that the matter of speed in settling a dispute in our industry is one of the prime considerations . . . "the use of counsel favors the larger, wealthier contestant who frequently employs counsel on a retainer basis, whereas the small firm does not and is confronted with the necessity of assuming additional unprovided expense." He goes on to point out how lawyers remove from arbitration its amicable atmosphere, creating in its place an atmosphere of tension and struggle. Underlying all of his objections, is, as Mr. Andreini stated at the beginning of his address, the feeling that lawyers are unequipped to argue disputes involving the highly specialized knowledge which most of the commercial trades require.[34] Arbitrators in the tribunals of these trade associations are generally themselves businessmen—experts on the subject matter of the dispute.[35] Rules of evidence and legal jargon mean little to them. Where, for

[31] The writer was moderator of a symposium on the subject, The Lawyer in Arbitration, held under the auspices of the Association of the Bar of the City of New York in May, 1952.

[32] Mr. J. Noble Braden, Executive Vice-President of the American Arbitration Association, was the first panel speaker. His remarks, however, were not partisan being directed to the purpose of arbitration, what it does, how it proceeds, and its various techniques. See his articles in 13 Missouri L. Rev., 143 (1948) and 6 Arbitration Journal (N.S.) 91 (1951).

[33] Compare Taeusch, *The Business-man's Opinion: Trial at Law v. Non-Judicial Settlement,* 83 U. of Pa. L. Rev. 147, esp. pp. 148–151 (1934).

[34] See an excellent discussion, *The Gans Bill is Tough on YOU!* by Jerome Campbell, in Modern Textiles Magazine, July, 1952.

[35] See Taeusch, *supra,* note 33, at p. 147.

instance, the quality of a shipment is in dispute, facts are crucial,[36] and they will devote their energies to discovering those facts without regard to legal niceties. Lawyers, it is felt, being inexpert in such matters as quality, etc., rely on courtroom tactics, which delay and becloud the fact-finding process. To make it impossible to exclude counsel by arbitration rules means that at virtually all hearings both parties will have counsel, since he to whose advantage the technicalities and delays run, will insist on counsel, forcing his opposite number to resort to counsel purely from "fear of being at a disadvantage."[37] In rebuttal on the symposium panel, Murray L. Jacobs, Esq., well-known trial lawyer, argued capably that one had to admit that to permit the use of counsel favors the larger, wealthier disputant. Equally, however, and for the same reasons, arbitration *without* counsel favors the large and wealthy. Such disputants usually have one man on their staff who, though not a lawyer, either does or could specialize in preparing and arguing arbitrations. Such a specialist (and obviously such specialists would not be found in small commercial concerns infrequently involved in disputes) gives his employer a very real advantage.[38]

This brings us to the core of the problem. Some say that lawyers are at times woefully inexpert in technical trade problems, that they at times fall back upon courtroom tactics, and that they all too often regard arbitration hearings as adversary rather than analytic and amicable. If this were so, disputants, both present and prospective, might fear counsel, and might attempt to avoid counsel if they could. On the other hand there appears "no valid reason for the exclusion of lawyers, against the will of the parties."[39] It follows from this that parties should be allowed to waive, at any time, the right to representation, provided that they are clearly aware of what they are giving up and so indicate in writing. The 1951 proposal of the Judicial

[36] Heineman, *Enforceable Arbitration of Commercial Disputes in the Textile Industries*, 61 Yale Law Journal 686, 714-716 (1952). The portion of Mr. Heineman's article, sub-titled "Use of Counsel" is extremely interesting and authoritative, being based upon the cumulative results of elaborate questionnaires sent to and returned by over 800 businessmen and over 100 arbitration-practicing lawyers.

[37] Heineman's data indicates that most arbitrators in textile disputes consider counsel a detriment. A few, however, indicate that the lawyer's value depends in each individual case on the ability of the lawyer involved.

[38] 17th Annual Report, *supra* note 17, p. 218.

[39] *Ibid.*, p. 220.

Council,[40] corrected as to the time at which such waiver may be made, might then be a sound piece of legislation.[41]

Conclusion

The Gans Bill does not represent a local problem. It represents a rather universal belief that follows arbitration wherever it develops. Some businessmen after experience with counsel in arbitration question the necessity for counsel in arbitration. However, even though counsel may bring to an arbitration hearing all the enumerated weaknesses, he brings at the same time definite benefits. All sources critical of the value of universal representation by counsel admit that some lawyers are indeed very much worth their salt in arbitration. If some, then why not all? The answer is two fold:

First, the development of valuable arbitration techniques takes time. The emergence of a large body of competent arbitration practitioners is a problem of education. The fact that some industries consistently present for arbitration problems of a highly technical nature need not deter. Lawyers become skillful in the practice of advertising law, of radio and television law, of insurance law. There is no reason why they may not be properly educated in the techniques of the law of other industries. Tremendous strides have been taken since the first arbitration laws were passed—strides amounting to a degree of progress of which the profession may be justly proud. But lawyers cannot learn only through bar association symposia and articles in law reviews. They must have access to hearings. They need the experience. Legislation which will encourage disputants to resort to counsel without actually forcing counsel on them should result in higher standards of presentation and in more certain justice. Finally, there are some lawyers suited for arbitration and some who are not. As arbitration becomes more established as a means of settling disputes, as more and more lawyers take to arbitration practice, here, as elsewhere, the cream will rise noticeably to the top.

It, therefore, seems that the problem of representation by counsel is returned to the laps of the legal profession. The basic objections to

[40] *Ibid.*, p. 218.

[41] As to the aspect of this question in enforcement proceedings of New York awards abroad, see Domke, *The Enforcement Abroad of American Arbitration Awards*, 17 Law and Contemporary Problems 545 (1952) at p. 563.

counsel are in most instances created by failures on the part of counsel. However, these objections are bound to fall away as the bar educates itself in arbitration procedures as an adjunct, not a substitute, for the courts and in techniques which will aid, and not hinder, the arbitration tribunal in the rapid discovery of facts and the doing of justice as between the disputants.

Moreover, the writer believes that as the bar becomes more adept at the arbitration technique, it will find that the technique can be a financially successful part of its practice. As Judge Stanley Mosk indicates in a recent article:[42]

> "The lawyer who has given arbitration a fair opportunity finds no menace to his professional security. On the contrary, he may experience in organized tribunals, standard rules of procedure, favorable arbitration laws, available qualified arbitrators and comfortable hearing-rooms, opportunity for the practice of arbitration which ultimately may have as large a role in his total program as have court trials."

> "Lawyers who have had prior misgivings over fees in arbitration matters for the most part have been disabused of those fears. While on a strictly hourly billing, court trials will produce more revenue for the law office, as a practical matter most lawyers charge clients on a basis of hours plus results achieved. A client who has been saved both the inconvenience of a long delay before trial, and a tiresome trial itself, and who has experienced a less protracted and expedient arbitration proceeding, may well consider the results achieved sufficient to justify a thoroughly adequate counsel fee."

[42] Mosk, *The Lawyer and Commercial Arbitration*, 39 American Bar Association Journal 193, 196 (1953).

Conduct of Arbitrators

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The decision of the Appellate Division of the Supreme Court, First Department, in *A. M. Perlman, Inc.* v. *Raycrest Mills, Inc.*, 280 App. Div. 744, 117 N.Y. Supp. 2d 572, decided Dec. 16, 1952, illustrates the desire of the courts to uphold arbitrations and, at the same time, the pitfalls where each of the two parties selects one of the three arbitrators.

In that case the parties each selected an arbitrator from the industry panel of the General Arbitration Council of the Textile Industry and the two so chosen picked a third (hereinafter called the "third arbitrator") from that panel. The seller made claim for the purchase price of merchandise and the buyer resisted, claiming defects in the merchandise. An award in favor of the seller was set aside at Special Term, but in an opinion by Mr. Justice Breitel, the Appellate Division reversed and confirmed the award.

The buyer claimed misconduct and partiality by the arbitrators as follows: (1) that a prior arbitration between the parties was referred to by the person who acted as secretary at the hearing; (2) that the arbitrator selected by the seller and the third arbitrator read the opinion of the court setting aside the prior arbitration award; (3) that the third arbitrator made a remark outside of the hearing room and before testimony was taken that it looked as if the buyer was reneging and that there was "nothing to this case" and referred to a drop in the market; (4) that the arbitrator selected by the buyer was snubbed by the other two in that they avoided having lunch with him, taxied to the hearings without him and held whispered conferences between themselves to the exclusion of the arbitrator selected by the buyer; (5) that the third arbitrator consulted private memoranda concerning the fall in market prices following the making of the contract; (6) that two of the arbitrators failed to examine all of the merchandise which was left with them; and (7) that after the arbitrator selected by the buyer resigned and before the award, the buyer was placed in the prejudicial position of questioning the partiality of the two other arbitrators.

The Appellate Division overruled all of the buyer's objections and pointed out that the main cause of all the trouble was the conflict

between the arbitrator chosen by the buyer and the other two arbitrators. The court said that "It would seem to be a perilous process to make findings of partiality on the basis of accusations among fellow arbitrators, unless the proof is clear and convincing, if not indeed compelling" and added "we should not destroy the advantages of arbitration to those who seek to avail themselves of those advantages by permitting awards to be set aside easily because of the acrimony that may develop among arbitrators."

The events reviewed above are most uncommon but, when they occur, are found almost invariably in arbitration proceedings where each of the parties has selected a "friendly" arbitrator either of his own independent choice or from an "industry" panel. The better procedure for the selection of arbitrators is to follow that which is administered by the American Arbitration Association and which requires both parties to indicate their approval or disapproval of persons on a list of ten to twenty names selected from a panel and then to permit the governing body under whose rules the arbitration is conducted to select the three arbitrators from the names of those who are mutually agreeable to both parties. So-called "industry" panels sometimes result in favoritism which can best be avoided by arbitrations under rules which are not formulated for any particular industry. Even so, unpleasantries may occur between arbitrators in rare instances but as Mr. Justice Breitel pointed out, conflict between arbitrators because of their views or personal animosity toward each other will not invalidate an award.

The award was made by the two remaining arbitrators after the resignation of the arbitrator selected by the buyer and a determination by the General Arbitration Council, under whose rules the arbitration was held, that the arbitration should continue before the two remaining arbitrators. The confirmation of the award under those circumstances is a precedent of considerable importance.

The court regarded the remark by the third arbitrator that it looked as if the buyer was "reneging" and there was nothing to the case as "injudicious." The court further stated that "it is better not to talk until the time for speech has arrived" and while "propriety required that he not speak thereof (concerning his impressions) even to his fellow arbitrators," nevertheless an arbitrator had a right to a tentative impression because "even rules of law cannot change the nature of the human mind, and that the mere expression of an impression did not in itself presage "a fixed judgment."

The court further held that arbitrators are not required to review

every detail of evidence (in this case to examine every yard of merchandise left with them) but only "to determine how much of the detail must be examined or considered."

The third arbitrator's examination of his private memoranda with respect to a fall in market prices, came within the rule that an arbitrator may call upon his own experience and knowledge but it is not amiss to issue a word of caution that an arbitrator cannot go to any outside source for information under any circumstances.

It appeared that the buyer had inadvertently "blurted" out before the arbitrators that he had "lost" the first arbitration—otherwise, it is possible that the court would have held that the buyer was prejudiced by the reference to the first arbitration and by the examination of the opinion of the court in the first arbitration proceeding.

Notice of Forthcoming Articles

The next issue of the Arbitration Journal will include, in addition to the regular features, "Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act," by Isadore Katz and David Jaffe; "Japanese Arbitration Law" by Hilliard A. Gardiner; a note by Sir Lynden Macassey on a recent decision of the English Court of Appeal in regard to arbitration under changed price regulations for the sale of Irish stewed steak; and a review of the important new book by Wesley A. Sturges, Dean of Yale Law School, "Cases on Arbitration Law."

Effect of Time Limitations on Arbitration Agreements

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Arbitration agreements frequently contain time limits on invoking the remedy of arbitration. Commercial necessity frequently gives rise to the inclusion of such clauses. Controversies concerning perishable goods demand by their very nature that claims be asserted and contested within limited periods of time if the quality or condition of the merchandise or food stuffs is a factor to be considered and determined.

The effect of statutes of limitation on law suits is well understood by business men and lawyers. Under Section 10(1) of the Civil Practice Act, limitations of time within which actions may be brought on claims arising out of transactions may be incorporated in any contract and such contract limitations are uniformly enforced in accordance with their terms by the courts. Examples are found in the time limitations commonly incorporated in insurance contracts.

When a contract providing for arbitration fixes a time limit for demanding arbitration, the failure to observe such time limitation will result in a loss of all remedies for the enforcement of a claim arising out of a contract. If arbitration is barred because of the lapse of time, an action at law is also barred. So the Court of Appeals has recently ruled in *Latrobe Brewing Company* v. *River Brand Rice Mills, Inc.*, 305 N. Y. 36, 110 N.E. 2d 545, decided on January 15, 1953.

This case involved a sale of brewer's rice, shipment to be made f.o.b. seller's place of business in Texas, to the purchaser, located in Pennsylvania. The sales agreement contained a broad arbitration clause in usual form and also provided that "any demand for arbitration must be made within five days after tender." The purchaser instituted arbitration proceedings on a claim for alleged breach of warranty approximately a year after the delivery of the goods. On motion of the seller, the court permanently stayed such arbitration proceedings. This stay was granted under Section 1450 of the New York Civil Practice Act on the ground that arbitration had not been demanded within the time limitation incorporated in the contract. This ruling of the court followed well understood holdings that "when the parties have specified that arbitration must be instituted prior to

a given date, it is presumed, that the parties intended to be bound by the provision and that the particular date mentioned is an essential part of the contract." (*Matter of Broadway-40th Street Corp.*, 271 App. Div. 219, affd. 296 N. Y. 165 (1947).)

An agreed time limit on demanding arbitration which has been enforced by stay proceedings under the Civil Practice Act, and which has resulted in the bar of the remedy of arbitration, does not in any way alter the character of the arbitration forum as the exclusive forum and as affording the exclusive remedy under the agreement between the parties with respect to claims.

In the *Latrobe Brewing Company* case, the purchaser commenced an action at law after it was stayed from proceeding at arbitration and claimed damages on the theory that if arbitration was no longer available there remained the residual remedy of a common law action. The seller promptly applied for a stay of such action under Section 1451 of the Civil Practice Act, which provides that if there is in existence an arbitration agreement and the issue which is raised between the parties is "referable to arbitration," then any law suit must be stayed "until such arbitration has been had in accordance with the terms of the contract." The seller argued that all remedy was lost to the buyer by lapse of time. The buyer, on the other hand, claimed that the issue was no longer referable to arbitration within the meaning of the statute since arbitration had been permanently stayed by the prior proceedings on behalf of the seller and no arbitration could therefore be had in any event. The lower court agreed with the buyer and ruled that the seller's application for a stay under Section 1450 of the Civil Practice Act constituted an election to waive arbitration and, therefore, Section 1451 was inapplicable. In effect, Special Term held that when demand for arbitration was made belatedly the seller could either permit arbitration to proceed, despite the untimeliness of the demand, or, if it elected to take advantage of such untimeliness by staying arbitration, then the seller would be compelled to submit to such court action as might follow. The Appellate Division of the Supreme Court, by a closely divided court, reversed the Special Term and granted the stay. On appeal to the Court of Appeals, the order of the Appellate Division was affirmed and the law suit was ordered to be stayed.

Judge Albert Conway, writing for the Court of Appeals, said: "It is true that in this controversy the arbitration is no longer available because of the existing permanent injunction. However, that would not affect the binding force of the agreement."

Judge Conway said "to permit an action at law after the parties have agreed to submit any dispute arising under a sales contract would be to set at naught the underlying policy which has shaped the growth of arbitration law in this state." Judge Conway pointed out that one may not say that insistence upon fulfillment of an agreement is an abandonment or waiver of it and pointed out that such would be the result which a contrary holding would reach in the *Latrobe* case. The policy underlying arbitration and its enforcement by the highest court of the state was carefully expressed in Judge Conway's opinion as follows:

> "In the course of our decisions indicating the purpose and intent of the Legislature in amending the Arbitration Law from time to time, we have stressed the Legislative purpose to strengthen that law by holding the parties to the terms of their agreement providing for arbitration of their disputes and to provide an exclusive remedy to prevent departure by either party from such agreement."

Thus, although the time limitation written into the agreement may result in ending the right to arbitration, nonetheless that does not vitiate the effectiveness of the arbitration contract itself—it remains effective. A claim under the agreement is still "referable to arbitration" and cannot be settled otherwise than by arbitration.

Section 1451 of the New York Civil Practice Act finds its customary application when a party to an arbitration agreement tries to avoid arbitration and sues at law; the statute makes a stay of such suit mandatory and thereby compels the claimant to resort to arbitration in accordance with the agreement between the parties. This statute is also applicable to the reverse situation where a party first institutes arbitration proceedings, finds that such remedy of arbitration has become barred by limitations of time, and then seeks to enforce the claim in an action at law. The spirit and purpose of Section 1451 of the Civil Practice Act is to hold the parties to their agreement and to limit them to the agreed remedy of arbitration. Such an interpretation of Section 1451 appears to be essential to prevent the circumvention of arbitration agreements containing time limitations. Were it otherwise a party who preferred to litigate, rather than arbitrate, could wait until the time limitation had expired and then claim that because the remedy of arbitration was barred a suit at law could, therefore, be maintained. This would be contrary to the intention of the contracting parties and frustrate the purposes of the Arbitration Law.

The Arbitration Clause in Quebec*

Walter S. Johnson, Q. C.

Author of "The Clause Compromissoire: Its Validity in Quebec" (1945).

A recent judgment of the Quebec Court of Appeal, *Boisvert* v. *Plante,* reported only in summary form,[1] deserves some comment, if not indeed a fuller report, for it settles one question which heretofore has been in doubt and greatly misunderstood.

Plante, a contractor, agreed to convert and rebuild Boisvert's house. A clause of the contract stipulated that (translated):

> Disputes arising between the parties relating to the execution of this agreement cannot be brought before the courts unless and until the parties have had recourse to arbitration. The arbitrators shall be three in number: one named by each party, the third chosen by these two. The decision of the arbitrators shall be final and the parties shall be bound to abide by it under pain of a penalty by way of damages in an amount of $200.

Plante sued for a balance of the contract price. He was met by pleas of unfinished and defective work, of failure to comply with article 2013d of the Quebec Civil Code (denying a builder's right to exact any payment before furnishing the owner with a signed statement of all amounts due him for labour and materials), and of failure to proceed to arbitration before suing. The trial judge, now reversed on appeal, dismissed all pleas and gave the plaintiff judgment. As for the promise to arbitrate before taking action, the defendant's plea based on it "cannot avail because a *clause compromissoire* of the kind in a contract does not deprive the courts of their ordinary jurisdiction" (translated). In effect, to put it in another way, the clause purported to oust the jurisdiction of the courts, and as such was null and void. The authority cited by the trial judge for this conclusion is *Archambault* v. *Saurette,*[2] an isolated case, though others might have been recalled in support which also failed to distinguish a clause, like the one here in question, requiring an arbitration before suing, and a clause simply denying any recourse to the courts and making the arbitral award a complete and final solution. In

* Reprinted, with permission, from The Canadian Bar Review, vol. 30 p. 931 (1952). Cp. also the author's article: "Enforcing the Promise to Arbitrate" in Arb. Journal, vol. 5 (N.S.), p. 143 (1950).

[1] [1952] Q.B. 471.

[2] (1930), 36 R. de J. 84.

those cases, either clause was void as contrary to public policy under article 13 C.C. because purporting to oust the jurisdiction of the courts.[3]

That doctrine of public policy did not come to Quebec from French law. If not of indigenous growth, it came from England where in old Wesminster Hall, at a time when judges had no salaries and had to rely on fees attaching to each case heard, it was deemed contrary to public policy that parties should by-pass the courts and promise to settle by arbitration. In our day, when judicial salaries are paid by the state, it should not be deemed contrary to public policy that parties to a contract should agree to arbitrate rather than face the hazards, delays and exceeding expense of recourse to the courts, and that they should make such a clause an express and prime and binding condition of contracting at all; for in the one hypothesis, arbitration, the likely delays and expense can be fairly estimated, and in the other, a suit at law, the possibility must be faced, in Quebec, of delays of from two to five years, mounting expense, and possible and whelming disaster in the end.

The judgment of the Court of Appeal under comment has taken one welcome step forward. It decides (Gagné J. expressing no opinion) that the clause in question is merely a condition precedent to a right of action, and as such binding on Plante; that it was his duty, not that of Boisvert, first to demand an arbitration; and that as recourse to the courts was still open to Plante if he did not accept the award (and *semble,* provided he first paid the damages of $200), the clause did not oust the jurisdiction of the courts and hence was not a "true *clause compromissoire*". We shall have to wait for an authoritative decision on the effect of the true *clause* depriving the parties absolutely of their right of recourse to the courts. If such a clause is in danger of being held void, of an absolute nullity, as contrary to stringent public policy, it may be well first to consider that no text of law forbids it or forbids citizens to settle their differences in any way they choose; that it is a condition of thousands of commercial contracts; and that if it is void of an absolute nullity, hence *ab initio,* and if parties do agree to and act upon it, the whole proceeding is void, the clause, the arbitration and award and acceptance, which means that it all could be challenged and upset. And that, surely, would be contrary to good public policy—a restraint of trade, a disturbance of confidence, a condonation of breach of contract.

[3] Article 13 C.C. provides: "No one can, by private agreement, validly contravene the laws of public order and good morals".

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under the main headings of: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

A margin agreement with a New York brokerage firm which provided for arbitration was challenged on the ground that the policy of the Federal Arbitration Act which permits settlement by arbitration was overridden by Congressional policy when the Securities Act of 1933 was adopted. It was argued that since the Securities Act protects purchasers of securities, controversies relating to misleading statements by a brokerage firm may not be referred to arbitration. A decision of the District Court, 107 F. Supp. 75, to that effect was reversed, the Court of Appeals stating that "if the parties may agree to arbitrate after the action has been brought, we can conceive of no sound reason why they may not agree in advance, provided no fraud or coercion was practised upon the buyer in securing his consent to the arbitration agreement. . . . It can hardly be doubted that he could voluntarily settle his claim without bringing suit. If so, why may he not agree to settle it by arbitration? . . . There is good reason why he may prefer to seek enforcement of his statutory right to damages through the speedy remedy of arbitration rather than by the long delayed remedy of trial in the courts. Particularly is this true in the City of New York where calendar congestion both in the state courts and the federal court is notorious and results in excessive delay." The court further pointed out that the legal measure of damages and the shift in the burden of proof, as provided in Section 12 (2) of the Securities Act, must be considered by the arbitrator, since the agreement expressly is subject to that Act. "Consequently the arbitrators are bound to decide in accordance with the provisions of Section 12 (2). Failure to do so would, in our opinion, contribute ground for vacating the award pursuant to Section 10 of the Federal Arbitration Act." *Wilko v. Swan,* 201 F. 2d 439 (U. S. Court of Appeals, Second Circuit, January 15, 1953; Swan, Chief Judge; Clark, Cir. J. dissenting).

When the existence of a binding arbitration clause is in dispute because of the contract not having been signed by a corporate officer, the burden of proof is upon the one who asserts that there was an arbitration agreement, without regard as to whether the issue of a valid arbitration clause arises on an application to restrain arbitration or to compel it (Sec. 1450 C.P.A.). *Matter of Sheepshead Underwear Corp'n,* N.Y.L.J., November 20, 1952, p. 1229 (Sup. Ct.) Johnson, J.

A sales note for a light-weight cotton fabric provided that it was "subject to the provisions of the Standard Cotton Textiles Salesnote which, by this reference, is incorporated as a part of this agreement and together herewith consti-

tutes the entire contract between buyer and seller. No variation therefrom shall be valid unless accepted in writing." The Salesnote, thus incorporated by reference in the Agreement, provided in art. 10 for arbitration in the City of New York, under the rules of the General Arbitration Council of the Textile Industry. A buyer who refused to appoint an arbitrator successfully opposed arbitration, both in Special Term and in the Appellate Division, on the challenge that no agreement to arbitrate existed between the parties, since he was at no time informed in any way of provisions requiring arbitration under the contract. The Court of Appeals, in reversing the decision, said: "Each of those contracts contains the statement that it is made 'subject to the provisions of the Standard Cotton Textile Salesnote' which, as we have seen, was expressly '. . . incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller.' Difficult it would be to find words more clearly to express the contractual intent of the parties. There is no evidence that an attempt was made to limit the application of the Standard Cotton Textile Salesnote; nor was there indication that any one of the ten subdivisions of the Salesnote was not intended to apply. Indeed, a contrary intention is indicated by the sentence which immediately follows the contract provision last quoted above 'No variation therefrom shall be valid unless accepted in writing.' . . . In view of the documents to which reference has been made—which, when integrated, form the contracts executed by buyer and seller (See Williston on Contracts (Rev. Ed. 1936), Vol. 3 Sec. 628) we regard the buyer's contention—that no contract to arbitrate exists between the parties—as being at variance with the plain language of its agreements." *Level Export Corp. v. Wolz, Aiken & Co.*, N.Y.L.J., March 25, 1953, p. 987. (Court of Appeals; Lewis, J.; Desmond and Fuld, JJ. dissenting).

Order forms containing an arbitration clause, as the court stated, "expressly provided were to become agreements 'when executed by both of us.' In addition, they called for the signature of the movant and contained a provision that they were to become valid and binding agreements when the movant shall thereafter have received a signed copy from the respondent. The documents in question were never signed by the movant and were not returned by it to the respondent and, of course, were not thereafter signed by the respondent. In the circumstances, there were no written agreements between the parties providing for arbitration." In distinguishing *Exeter Manufacturing Co. v. Marrus*, 254 App. Div. 496, and *Bellmore Dress Co., Inc. v. Tanbro Fabrics Corp.*, 115 N. Y. S. 2d 11, the court granted a motion to stay arbitration. *Gaynor Junior Dresses, Inc. v. James Talcott, Inc.*, January 29, 1953, p. 329, Botein, J.

When a contract containing an arbitration clause was entered without petitioner's authorization, and petitioner's agent demanded payment on the ground that the principal had rejected the contract, entered into by the agent, and the other party acquiesced in the repudiation by the petitioner of the contract as unauthorized, then no binding agreement exists between the parties and an arbitration could not be had. *Keckla v. Baeff & Vesely, Inc.*, N.Y.L.J., February 9, 1953, p. 448, Botein, J.

Alleged illegality of closed-shop provisions does not prevent confirmation of an award when such issue was not even impliedly submitted to the arbitrator.

Under California law the question of the legality or illegality of a contract is a legal point to be determined by the courts and not by arbitration (Loving and Evans v. Vlick, 33 Cal. 2d 603, 204 p. 2d 23; see *Arb. J.* 1949, p. 150). Nevertheless, when the award was challenged on the illegality of those provisions, a matter not mentioned in the submission agreement, the court said: "The court in confirming the award does not enforce an illegal contract. It affirms the decision that the parties are bound by the contract which, if it produces unfair labor practices can be brought to the attention of the National Labor Relations Board." The judgment confirming the award was upheld, since the record "does not present a case where an arbitrator refuses to pass upon an issue submitted to him . . . thereby leaving appellent to proceedings before the National Labor Relations Board, the tribunal which concededly has exclusive jurisdiction of the question of unfair labor practices." *Pacific Fire Rating Bureau v. Bookbinders' and Bindery Women's Union No. 31-125,* 251 Pacific Reporter 2d 694 (Cal. App. December 29, 1953, Goodell, J.)

Duress in obtaining an agreement containing an arbitration clause was set forth in a motion to stay the arbitration which was denied (see *Arb. J.* 1952, p. 254). The Appellate Division confirmed the order in stating: "There are no evidentiary facts set forth in the motion papers raising a substantial issue as to the making of the contract." *Local 853, Retail Furniture & Floor Covering Employees Union, R.W.D.S.U., C.I.O. v. Zimmerman,* 117 N.Y.S. 2d 88 (2d Dept. December 1, 1952).

A fine print provision which referred to "Cotton Yarn Rules" was not considered sufficient to submit a party to arbitration under the Rules of the General Arbitration Council of the Textile Industry, inasmuch as the party relying on the provision failed to prove that the other party, as the court said, "when it entered into the contract, was aware that the stated rules contained a provision which might be said to subject controversies under the contract to arbitration." In reversing an order to proceed to arbitration, the court relied on *Matter of General Silk Importing Co., Inc.,* 198 App. Div. 16, 200 App. Div. 786, aff'd 234 N.Y. 513; *Matter of Level Export Corp'n. v. Wolz Aiken & Co.,* 280 App. Div. 211. (The latter decision, however, has meanwhile been reversed by the Court of Appeals, see *Arb. J.* 1953, p. 45.) *Riverdale Fabrics Corp'n v. Tillinghast-Stiles Co.,* 118 N.Y.S. 2d 569 (App. Div., 2d Dept.).

Division of commissions between a real estate salesman and "any officer of the company or employee of the company" was to be determined under an employment contract by an officer of the company other than the one involved. The contract provided further "in the event that the salesman is dissatisfied with the decision the company agrees to arbitrate before the Brokerage and Arbitration Committee of the Westchester County Realty Board." The salesman claimed that the arbitration clause did not apply to a dispute on the division of commissions with the company itself, but referred only to disputes with employees or officers of the company. The court, however, did not give such an interpretation to the arbitration clause and directed arbitration in saying: "The dispute itself would normally be between the salesman and an officer or employee, acting for the most part for the company and only occasionally for himself where the issue concerned his own claimed share of the commission. By

this interpretation the arbitration clause reaches all disputes over the division of commissions instead of being confined, as the respondent would confine it, to the rarer instances in which the disputed division is between the salesman and another member of the petitioner's organization as an individual." *Walter & Samuels, Inc. v. Scher,* N.Y.L.J., January 28, 1953, p. 313, Hofstadter, J.

II. THE ARBITRABLE ISSUE

A sales agreement which provided for submission to AAA arbitration of all claims or controversies regarding the meaning, application or extent of either party's performance of any provision of the agreement, gave rise to a dispute about the meaning of a warranty clause of quality of auger bits which were sold and delivered in 1946. Such warranty should expire twelve months from the date of receipt. No notice of alleged breach of warranty was given until after the expiration of twelve months. The question arose whether this clause referred to the time within which claims might be made, as well as to the limitation on the duration of the warranty itself. In affirming Special Term which granted a motion to compel arbitration, the Appellate Division did not pass upon the meaning and the scope of the clause in question, but "in the light of the wording of the warranty clause in question, this left to the arbitrators the meaning, application and scope of that clause when the parties disagreed." *Unsinn v. Republique Francaise,* 281 App. Div. 738, 117 N.Y.S. 2d 801 (First Dept. January 8, 1953; van Voorhis and Breitel, JJ., dissenting in stating that "claims must be presented within twelve months, which is a long enough period in the case of auger bits to be reasonable for that purpose as matter of law").

The cancellation of a written employment contract containing an arbitration clause by a later oral agreement and the further disputed question as to whether the employment in fact continued thereunder, is an arbitrable issue; a court proceeding was therefore stayed until the parties should arbitrate their dispute. *Smoler Bros, Inc. v. Skorman,* N.Y.L.J. December 3, 1952, p. 1360, O'Brien, J.

"The problem of senority rights here involved is not one adapted for judicial adjudication; it is properly one for negotiation or arbitration between the parties," said the U. S. Court of Appeals, Second Circuit, in affirming a decision which had denied a motion to vacate an arbitration award rendered in a dispute of two groups of pilots as to respective senority rights, under a merger of two air carriers, where arbitration services were correctly proffered by the National Mediation Board. *O'Donnell v. Pan American World Airways,* 200 F. 2d 929 (Second Circuit, January 7, 1953, Clark, C. J.).

Salary rates of teachers were in dispute between a voluntary teachers association, an independent union, and the Board of Education in Norwalk, Conn. Among the questions brought before the Superior Court in Fairfield County and reserved by the Court (Daly, J.) for the advice of the Supreme Court of Errors, there was that as to whether arbitration was a permissible method under Connecticut law to settle such disputes. Said the court: "Arbitration as a method of settling disputes is growing in importance and, in a proper case, 'deserves the enthusiastic support of the courts.' *International Brotherhood of Teamsters v. Shapiro,* 138, Conn. 57, 69, 82 A. 2d 345. Agreements to submit all disputes to arbitration, commonly found in ordinary union contracts, are in

a different category. If the defendant entered into a general agreement of that kind, it might find itself committed to surrender the broad discretion and responsibility resposed in it by law. For example, it could not commit to an arbitrator the decision of proceeding to discharge a teacher for cause. So, the matter of certification of teachers is committed to the state board of education. General Statutes 1432, 1433, 1435." In answering "yes" to the question, the court stated: "arbitration may be a permissible method as to certain specific, arbitrable disputes." *Norwalk Teachers' Association v. Board of Education of the City of Norwalk,* 138 Conn. 269 (Jennings, J.)

Violation of a no-strike clause of a collective bargaining agreement prior to the expiration of a cooling-off period, was the basis of an action by the employer against the union for damages, which the union opposed among others by a motion for stay of the proceedings in view of the broad arbitration clause contained in the collective bargaining agreement. Said the court: "The defendant, in order to sustain its motion for a stay, relied upon *Donahue v. Susquehanna Collieries Co.,* 3 Cir., 1943, 138 F. 2d 3, 149 A.L.R. 271, and *Watkins v. Hudson Coal Co.,* 3 Cir., 1945, 151 F. 2d 311. With Courts of Appeal divided as to construction, Congress re-enacted the Arbitration Act with unchanged text but modified coverage. Subsequently, the Court of Appeals of this Third Circuit, in *Amalgamated Ass'n., etc. v. Pennsylvania Greyhound Lines,* 1951, 192 F. 2d 310, abandoned its earlier construction of the language of the Act and held that arbitration of a dispute growing out of a contract of employment cannot be required under U.S.C.A. Title 9. Subsequently, in *Pennsylvania Greyhound Lines v. Amalgamated Ass'n.,* etc., 1952, 193 F. 2d 327, 328, the Court of Appeals for this Third Circuit held that under the decision last cited 'the Arbitration Act gives the District Court no authority to compel arbitration of a dispute arising out of a 'contract of employment' of a class of workers engaged in interstate commerce with such a contract of employment construed in the same opinion to include a collective bargaining agreement.' In view of these decisions I must refuse the motion for a stay of proceedings." *Ludlow Manufacturing & Sales Co., v. Textile Workers Union of America, CIO,* 108 F. Supp. 45 (District Court D. Delaware, Rodney, D. J.)

A damage suit for breach of a no-strike clause was opposed by the union on grounds, among others, that the dispute has to be referred to arbitration as required by the collective bargaining agreement. That agreement provided that "any dispute or grievance involving a question as to the meaning and application of the provisions of this agreement be referred to arbitration." The District Court denied the motion for a stay pending arbitration on two grounds; first, because collective bargaining agreements were not within the scope of sec. 3 of the U. S. Arbitration Act, referring to Amalgamated Ass'n. v. Pennsylvania Greyhound Lines, Inc., 192 F. 2d 310, and secondly that the calling of the strike, as a material breach of the agreement, terminated it and thereby relieved the company of any duty which it would otherwise have had under the contract to submit to arbitration. The Court of Appeals, however, did not decide whether either or both of the aforementioned were proper grounds for denying the motion to stay the court action, since, the court said, "we do not think that the dispute here involved is within the scope of the arbitration clause. Arbitration was to be but a fourth step in the grievance procedure, and as such the subject

matter to which it is applicable is no broader than that to which the first three steps applied. The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration." Circuit Judge Clark, in a dissenting opinion, stated the following: "Clearly, an asserted breach of this prohibition is within the very terms of the required arbitration. Even had it seemed to me less clear I should have thought such a broad and enlightened interpretation desirable in the context of the modern labor practice; if arbitration is to be fostered even against conflicting statutory provisions, Wilko v. Swan, 2d Cir., Jan. 15, 1953, surely it should be upheld where agreement points and law does not forbid." *Markel Electric Products, Inc. v. United Electrical, Radio and Machine Workers of America, U.E., and Local 326, United Electrical, Radio and Machine Workers of America, U.E.*, U. S. Court of Appeals 2d Circuit, February 9, 1953, Civil Action File No. 4951, Swan, C. J.

Whether time limitations in a contract exclude AAA arbitration, is a question to be submitted to the arbitrator and not the court, which stated: "Contractual provisions setting up short-term statutes of limitations in arbitration proceedings have been held not to constitute a bar to a submission of such issues to arbitration (Raphael v. Silberberg, 274 App. Div. 625, 86 N. Y. 2d 421)." *Diamond Exchange, Inc. v. H. A. Levanne Co., Inc.*, N.Y.L.J., December 22, 1952, p. 1561, Benvenga, J.

A dissolution proceeding of a corporation can not generally be stayed in view of an arbitration clause. The court, in directing the determination by a referee of the propriety of dissolving the corporation, said: "The arbitration provisions contained in the agreement between the parties do not constitute a bar to the dissolution proceeding. The provisions are not broad enough to embrace a dispute as to whether or not the corporation should be dissolved (See Matter of Cohen (Michel), 183 Misc. 1034, aff'd 296 App. Div. 663)." The court, on a companion motion, said: "It is unnecessary to determine at this time which of the 'issues', if any, are properly arbitrable, since the question may become academic if dissolution of the corporation is decreed. In the circumstances, the motion is granted to the extent of staying the proposed arbitration pending the final determination of the dissolution proceeding (cf. Matter of Sun Rubber Co. v. N. Y. Credit Men's Bureau, Inc., 278 App. Div. 933)." *City Commercial Corp. (Carroad v. Shankman)*, N.Y.L.J., February 26, 1953, p. 637, Schreiber, J.

A subcontractor agreed to indemnify and hold harmless the general contractor for injury to or destruction of real property and to provide various forms of liability insurance. This agreement also provided that any claim or dispute arising thereunder should be settled by arbitration. The insurance company issued a liability policy providing that insurer should "defend . . . any suit against the insured . . . for property damage," and that "no action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined . . . by judgment against the insured after actual trial." A claim for property damage arose and the general contractor initiated

AAA arbitration against the subcontractor. The insurance company refused to defend the subcontractor in the arbitration, on the ground that such proceedings was not a suit, and that a liability within the terms of the contract could not be imposed by arbitration. A declaratory judgment in favor of the subcontractor was reversed by a majority decision holding that the policy did not require the insurance company to defend the plaintiff in an arbitration nor obligated it to pay any part of the award entered against plaintiff in such proceedings. A dissenting opinion of Presiding Judge Nolan, with which Judge Adel concurred, set forth that the words "trial and suit" have to be understood in their frequent use in connection with determinations by tribunals other than the courts. (The case is now pending on appeal before the Court of Appeals.) *Madawick Contracting Co., Inc. v. Travelers Ins. Co.*, 281 App. Div. 754, 118 N.Y.S. 2d 115 (2d Dept., January 13, 1953).

Claims for extras and retained percentages were not considered covered by an arbitration clause in a construction contract under art 40 of the General Conditions of the Contract which provides that "all disputed claims or questions subject to arbitration under this contract shall be submitted to arbitration." Said the court: "Some of the other articles, such as 12 and 20, state that any question arising under those articles, shall be determined by arbitration. It therefore becomes apparent that it was not the intention of the parties to make the other articles of the contract subject to arbitration (Eagar Construction Corp. v. Ward Foundation Corp., 255 App. Div. 291)." *Gotham Construction Corp. v. Hycourt Realty Corp.*, N.Y.L.J., February 13, 1953, p. 495, Botein, J.

When no covenant in an agreement between the parties requires a party to continue manufacturing, the alleged breach of such duty is not an arbitrable issue, and the party is not bound to arbitrate the claim. Said the court: "It may not be compelled to arbitrate any claim arising out of its failure to do so. Matter of Kosoff (Jones), 276 App. Div. 621, 96 N.Y.S. 2d 689, affirmed 303 N. Y. 663, 102 N.E. 2d 584." *Fay v. Asterloid Mfg. Co.*, 281 App. Div. 657, 117 N.Y.S. 2d 855 (First Dept., December 9, 1952).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

A charter party executed in New York provided for arbitration in the City of New York and is therefore deemed a consent of the parties to the jurisdiction of the Supreme Court to enforce such contract and to enter judgment on an award (sec. 1450 C.P.A., as amended by Chapter 260 of the Laws of 1951.) In an action on the contract in the Municipal Court, the question arose as to the jurisdiction of the Supreme Court to stay that action, in view of the fact that an action for breach of the maritime contract would be in the exclusive jurisdiction of the federal courts. The court, in setting forth that arbitration "is merely a form of procedure whereby differences may be settled (Matter of Berkovitz v. Arbib, 230 N. Y. 261, 270)," considered itself authorized to enforce arbitration of the contract, for, as the court said, "arbitration 'deals merely with the remedy in the State courts in respect of obligations voluntarily assumed and lawfully incurred,' and 'does not attempt either to modify the substantial maritime law or to deal with the remedy in the courts of admiralty,' (Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123, 124; Christensen v.

Morse Dry Dock & Repair Co., 216 App. Div. 274, 284-286, app. dism., 243 N.Y. 587; 10 Carmody's N.Y. Practice, sec. 1126)." *T. J. Stevenson & Co. Inc. v. Internat. Coal Corp'n,* N.Y.L.J. January 16, 1953, p. 170, Benvenga, J.

A sales contract of brewers' rice with an AAA arbitration clause provided that any demand for arbitration must be made within five days after tender. After federal inspectors had destroyed a contaminated carload the buyer demanded reinbursement from the seller which was refused, and served a demand for arbitration ten months later. Special Term granted the seller an order permanently restraining arbitration, from which no appeal was taken. The buyer commenced an action in the City Court two months later to recover the purchase price and damage, but such action was barred by the courts since controversies should be settled by arbitration and such sole remedy was barred by the existing permanent injunction. Said the Court of Apepals: "To permit an action at law after the parties have agreed to submit any dispute arising under a sales contract would be to set at naught the underlying policy which has shaped the growth of arbitration law in this State. We traced the history of that growth in Matter of Feuer Transp. (Local No. 445) (295 N.Y. 87, 91, Medalie, J.) and pointed out that a quarter of a century of the operation of the arbitration law had demonstrated its usefulness and general acceptability. Where one of the parties to an arbitration agreement, containing a time limitation, permitted to allow such limitation to expire and then sue at law on the claim which it had agreed to arbitrate, the result would be a return to the situation obtaining when agreements to arbitrate were revocable at the will of a party thereto." In view of that decision the court action was dismissed, N.Y.L.J. March 19, 1953, p. 918, Schimmel, J. (see aricle by Milton Pollack in Arb. J. 1953 p. 1) *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.,* 305 N.Y. 36, 110 N.E. 2d 545 (January 15, 1953).

A claim of a factory owner against a building company for damages due to defective workmanship and material was submitted, with approval of the trial court, to arbitration. The challenge of misconduct of the arbitrator was dismissed, the court saying: "At common law, if the parties first resorted to the courts and then shifted to arbitration the shift operated as a discontinuance of the action at law, and again there would be no court with jurisdiction to entertain the motion of a party displeased with the work of the arbitrators. . . . 'It is well settled in this state that a mere submission of a controversy to arbitration operates *ipso facto* as a discontinuance of a pending action thereon, because the parties have chosen another forum for the determination of their controversies.' Sohns v. Sloteman, 1893, 85 Wis. 113, 116, 55 N.W. 158, 159, and cases there cited. That case excepted actions from such discontinuance when the submission expressly provided that the action should be stayed and not discontinued. The submission in the present proceeding contains no such provision. Therefore, if we are now dealing with a common law arbitration the parties' original action at law has been discontinued and the courts, including this one, are without jurisdiction over any part of the controversy until brought in by an action to enforce the award begun in the usual way by service of process." (In the instant case where parties proceeded with the arbitration according to the provision of Chapter 298, Wisconsin Statutes, and where no motion to confirm the award was made, it was held that no appeal lies from an order which denies a motion

to vacate an award.) *Pick Industries, Inc. v. Gebhard-Berghammer, Inc.*, 56 North Western Reporter 2d 97 (Sup. Ct. of Wisconsin, December 2, 1952, Brown, J.).

A sales contract for shares of a baking company provided for the delivery of additional stock of the buyer company should its business reach a certain volume. In a court action by the seller for the specific performance of this agreement, the defendant contended that this dispute must be submitted to arbitration but the plaintiff's motion to strike this affirmative defense was granted, the court stating: "It is improper for the defendant to plead the arbitration agreement as a defense or counterclaim. The defendant's sole remedy is to apply for a stay of the plaintiff's action pursuant to section 1451 of the Civil Practice Act until arbitration is had (American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 326-327)." *Pfeiffer v. Berke Bakeries, Inc.*, N.Y.L.J., March 13, 1953, p. 849, Murphy, J.

Banquet waiters brought an action against a hotel corporation to enforce a right as third-party beneficiaries of contracts between the corporation and guests of hotels, namely, for tips at banquet rooms allegedly not accounted for to the waiters. Though this action was not based on the collective bargaining agreement between the union and the corporation, the Union intervened as a defendant, whereupon the court stayed the action and remanded it to arbitration. The Appellate Div., however, held that the corporation waived its right to demand arbitration "by the steps which it took in defending the action at law. Such conduct amounted to an election of remedies (Matter of Zimmerman (Cohen), 236 N.Y. 15; Matter of Nathan Associates, 268 N.Y. 692). The provisions of the collective bargaining agreement against waiver would not prevent such election." The court said, moreover: "The union is not a person adversely affected by a judgment in favor of plaintiff or otherwise a party in interest, and nothing would be gained by allowing it to intervene in the action." Presiding Justice Peck, dissenting in part, said: "There is at least a question, therefore, of whether their (the waiters') rights are not governed by the collective agreement. This purports to be a representative action in behalf of all the banquet waiters of the hotel and the intervening union claims to be their exclusive representative. As such, and as a party to the collective agreement, and as the representative of other employees who are interested in the subject matter of this action, the distribution of gratuities, it seems to me that the union is entitled to intervene in the action." *Simadiris v. Hotel Waldorf Astoria Corporation and New York Hotel Trades Council, A.F.L.*, 281 App. Div. 665, 117 N.Y.S. 2d 350 (First Dept., December 16, 1952).

An alleged oral agreement between employer and employees which fixed the wages at an amount lower than those provided in the contracts between the employer and the union was considered not a defense as contrary to public policy in a court action for the difference between the wages the employee received and the wages agreed upon in the collective bargaining agreement. The court further held that the failure of the employee to demand arbitration under the arbitration clause of the collective bargaining agreement did not constitute any defense to this action, since under the authority of American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, the defendant's sole remedy was to apply to the court for a stay of the court action pending arbitration pursuant to sec.

1451 C.P.A. *Marvin v. Thomas J. Hoffman, Inc.*, 280 App. Div. 616, 117 N.Y.S. 2d 697 (Fourth Dept., November 12, 1952, Piper, J.)

Changing of the system of keeping time from the conventional method to so-called "Continental" or "Military" method, was refused by employees which resulted in their discharge. The union filed later charges of unfair labor practices with the National Labor Relations Board, but withdrew the charges with consent of the Regional Director. The collective bargaining agreement provided for the settlement of "any dispute arising out of this agreement" in a grievance procedure leading finally to arbitration. A motion to compel arbitration was refused, the court saying: "It is a serious question as to whether or not the alleged grievance or dispute concerns any items set forth in the contract but rather, if at all, it would more likely come under the claim of unfair labor practice. However, be that as it may, this motion should be denied on the simple ground that the petitioners have failed to live up to the agreement with the respondent. There is nothing before the court to indicate that the respondent has refused to conform to the terms of the agreement." *Cotter v. Ansco Division of General Aniline & Film Corp.*, 118 N.Y.S. 2d 500 (Anderson, J., Broome County, N.Y.)

Overtime charges in connection with newsreels were disputed under a contract which specifically provided that the respondent would, in no event, charge the petitioner "for any overtime in connection with the newsreel." Said the court: "It is well settled that, where a contract is clear and unambiguous, the question of whether a bona fide dispute exists between the parties is a question of law for the court to decide and, under such circumstances, the parties cannot be compelled to resort to arbitration (Alpert v. Admiration Knitwear Co., 304 N.Y. 1, 6: Matter of Carborundum Co., 198 Misc. 24, 27, aff'd 277 App. Div. 941). Here, the contract is clear and unambiguous; the issue is one of law, and there is nothing to arbitrate." *Warner News, Inc. v. Pathe Laboratories, Inc.* (*In re Pathe Laboratories, Inc. v. Warner News Inc.*), N.Y.L.J. January 9, 1953, p. 89, Benvenga, J.

An action for recovery of overtime payments under the Fair Labor Standards Act cannot be stayed in spite of a broad arbitration clause in the collective bargaining agreement between the employers' association and the Union. Said the Court: "The authorities hold that the right to sue given by the statute may not be curtailed by compelling the employee to resort to arbitration (Garrity v. Bagold Corp'n, 267 App. Div. 353, City Service Cleaning Contractors, Inc. v. Vanzo, 179 Misc. 368; City Bank Farmers Trust Co. v. O'Donnell, 39 N.Y.S. 2d 842)." *Berman v. N. Seidman & Son,* N.Y.L.J., January 9, 1953, p. 89, Hofstadter, J.

A bill of lading for a cargo of coal expressly incorporated all the terms of the charter party and thus incorporated the arbitration clause of the charter. The charterer named as consignee gave an "undertaking to obtain the release of the cargo which provided that it should become invalid if within three months from its date 'a claim is not lodged with a competent Dutch Judge, an arbitration agreement is not signed, or an amicable settlement is not arrived at.' " During the three months' period he tried to conclude an arbitration agreement which was resisted and brought suit in a Dutch court to preserve his rights on the undertaking. In this unusual situation, said the Court, "the mere commencement of

the Dutch suit may be held not to effect a waiver of the petitioner's right to arbitration. Persistence in its prosecution must, however, be viewed differently. Then, the petitioner would manifest a purpose to relinquish the arbitration remedy. Accordingly, the petitioner's application for arbitration will be granted if it abandons the suit in the Netherlands and takes the necessary steps to terminate it within a reasonable time." *Cia. Naviera Veragua, S.A. v. N. V. Rotterdamsche Kolen Centrale,* N.Y.L.J., February 30, 1953, p. 381, Corcoran, J.

A time charter executed in New York between a Colombian corporation and a Danish partnership for the transportation of bananas from the Republic of Colombia to New York City provided for arbitration of any dispute between the owners and the charterers by three persons, "that their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of the court." The Federal District Court in Florida declined jurisdiction of a libel suit to recover the value of the cargo of bananas, lost by spoilage due to leaky conditions of the vessel, because all parties to the controversy were foreign nationals. In reversing this decision the Court of Appeals held that "the district court should have enforced the arbitration agreement in accordance with the statute, retaining jurisdiction for that purpose. The statute contemplates that although the parties agreed to arbitrate, the traditional admiralty procedure, with its concomitant security, should be available to the aggrieved party, without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court." ***Industrial Y Frutera Colombiana S.A. v. The Brisk,*** 195 F. 2d 1015 (Fifth Circuit, Strum, C.J.).

A government contract for the construction of hemp mills in Minnesota, executed through the Commodity Credit Corporation, acting on behalf of the Defense Plant Corporation, both agencies of the U. S. Government, provided that "in the event of any disagreement arising under the contract it shall be submitted for determination by arbitrators" to be selected by the parties, a third arbitrator to be selected by the two arbitrators and in case of their failure to do so, by the senior judge of the Federal Court for the district in which the work is being done. In an action for damages allegedly resulting from delays on the part of the government, the construction firm denied that the arbitration clause barred the court action. Said the Court of Claims: "The plaintiffs say that the provision for arbitration is void, citing United States v. Ames, 24 Fed. Cas. page 784, No. 14441; Welch, Assignee of McCormick v. United States, 1 C.Cls. Rep. 1859–60, No. 199, p. 39; 33 Op. Atty. Gen. 160. We think, however, that the numerous Supreme Court decisions, the latest of which are United States v Moorman (338 U.S. 457) and United States v. Wunderlich (342 U.S. 98), approving the provisions of Article 15 of the standard form of government contract, show that the plaintiffs are wrong. That article provides that, in case of dispute, the decision should be made by the contracting officer, subject to the contractor's right to appeal to the head of the department, whose decision should be final. That is a sort of arbitration, albeit by agents of one party to the contract. Yet it violates as completely as arbitration by third persons, as provided for in the instant contract, would violate, any doctrine that Congress has consented to have decisions made against the Government only in the Court of Claims. We think, therefore, that the plaintiffs, feeling aggrieved by the

refusal to give them extra compensation for having the key seats cut, were required to ask for arbitration of the grievance, which the contract permitted them to do, and that they are not entitled to have it adjudicated here." *George J. Grant Const. Co. v. United States,* 109 F. Supp. 245 (Court of Claims, January 13, 1953, Madden, J.).

Adjudication under sec. 45 of the bylaws of the New York Coffee and Sugar Exchange is a proceeding between members of the Exchange not contemplated by Art. 84 of the Civil Practice Act. Said the Court: "The compulsory 'adjudication' procedure for all merchandise transactions which is found in section 45 of the bylaws provides that the award of the 'adjudicators' shall be 'final and binding' upon the parties. No provision is made for judgment on the award. Counsel for the exchange appeared upon the argument and maintained that the sole means for its enforcement lie in the disciplinary procedures of the exchange. In view of the clear expression of intent with respect to enforcibility in the former sections, the provisions for adjudication will not be deemed to have contemplated a proceeding pursuant to Article 84 of the Civil Practice Act (see Sanford Laundry v. Simon, 285 N.Y. 488, 494)." On the contrary, another system as embodied in sect. 47–51 of the bylaws, as the Court said, "clearly contemplates a statutory 'arbitration' similar to that provided by Article 84, C.P.A. It is based upon a voluntary submission before an 'Arbitration Committee' who shall be sworn and whose award shall be signed and acknowledged. Upon filing the submission and award in prescribed form with the county clerk, a judgment may then be entered according to the award." The "adjudication" will therefore not be interfered with upon a motion to stay under sec. 1458 (2) C.P.A. *Blanco v. Farr & Co.,* N.Y.L.J., February 4, 1953, p. 397, Nathan, J.

In a Municipal Court action a party pleaded in an amended answer the arbitration provision of the contract relied upon, but made a demand for a bill of particulars, examination before trial and a preclusion order. Said the court: "In such circumstances, it can hardly be held that the petitioner did other than waive its right to arbitrate." In distinguishing Short v. National Sport Fashions, Inc. 264 App. Div. 284, the court said: "Here, the undisputed evidence manifests an intention on the part of petitioner to acquiesce in respondent's choice of forum and a waiver of its right to arbitrate, even though he pleaded the arbitration agreement in the amended answer." *Nat. Container Corp'n v. Costello,* N.Y.L.J. January 30, 1953, p. 345, Hofstadter, J.

Dispute of a party with a third party who performed or agreed to perform a contract, "does not bar arbitration between the parties to the contract (Application of Jacoby, 33, N.Y.S. 2d 621, 624, 3 Am. Jur. 878, sec. 47)." *T. J. Stevenson & Co., Inc. v. Internat. Coal Corp.* N.Y.L.J., January 16, 1953, p. 170 Benvenga, J.

A court action on a contract containing a broad arbitration clause was stayed until arbitration be had, all the more as the plaintiff in the action, in resisting the application for a stay, "characterizes the petitioner's conduct as tortious and a repudiation of the contract. (Matter of Lipman (Haeuser Shellac Co., Inc.), 289 N.Y. 76; Matter of Kahn, 284 N.Y. 515; Application of Reconstruction

Finance Corp., 106 F. Supp. 358, 361, Weinfeld, D.J.)." *Korody Marine Corp. v. Habib Sabet,* N.Y.L.J., January 16, 1953, p. 169, Hofstadter, J.

Failure to plead the arbitration clause of the contract in an answer in a court action constitutes a waiver as "not asserted seasonably" (Nagy v. Arcas Brass & Iron Co. Inc., 242 N.Y. 97; Matter of Zimmerman v. Cohen, 236 N.Y. 15), all the more as a motion to stay the action and to direct arbitration was made only when the cause had been placed on the calendar, in the absence of any excuse for not having sooner asserted the right to arbitrate. *Burton v. Klaw,* N.Y.L.J. January 29, 1953, p. 329, Hofstadter, J.

IV. THE ARBITRATOR

Arbitration within the Soviet Union cannot be denied when a Pennsylvania firm in a 1947 buying contract with the N.Y. purchasing agency of the Soviet Union, Amtorg Trading Corporation, agreed to arbitration of disputes before the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission in Moscow. An order of Spec. Term, 197 Misc. 398, 94 N.Y.S. 2d 651, held the named arbitrator disqualified because of its identity with the government party, appointed a substitute arbitrator and stayed the court action. This order was modified by the App. Div., 277 App. Div. 531, 100 N.Y.S. 2d 747. The Court of Appeals in affirming, said "Camden chose to do business with Amtorg and to accept, as one of the conditions imposed, arbitration in Russia; it may not now ask the courts to relieve it of the contractual obligation it assumed." The Court of Appeals further referred to the order of the Appellate Division saying that it "does not preclude Camden from taking appropriate action should the arbitration in fact deprive it of its fundamental right to a fair and impartial determination. If, as conceded by Amtorg, the arbitration is to be conducted pursuant to the provisions of article 84 of the Civil Practice Act and enforced thereunder, Camden may move to vacate an award in favor of Amtorg for evident partiality of the arbitrators, Civ. Prac. Act, sec. 1462, or may object to confirmation of such award on that ground, Civ. Prac. Act. secs. 1458, 1461. If such award were to be enforced by action, it would be a valid defense that the proceedings were not conducted in such manner as to result in a fair and impartial determination. Gilbert v. Burnstine, 255 N.Y. 348, 357–358, 174 N.E. 706, 708–709, 73 A.L.R. 1453." *Amtorg Trading Corp. v. Camden Fibre Mills,* 304 N.Y. 519, 109 N.E. 2d 606 (December 5, 1952).

Naming of an arbitrator pursuant to a court order compelling arbitration without reserving any right to question the propriety of the order, constitutes a waiver of the party's right to object to the order, which could therefore no more be appealed. *A. R. LaMura, Inc. v. Rochelle Arms Apartments, Inc.,* 281 App. Div. 683, 117 N.Y.S. 2d 434 (2d Dept., December 8, 1952).

The Committee on Arbitration of the National Federation of Textiles could not be enjoined and restrained from appointing new arbitrators and from directing arbitration to proceed with the presently constituted arbitrators. Said the court: "The parties agreed that the arbitration should be governed by the rules of said association, these are binding on the parties. The arbitration committee determined that a vacancy exists for the reasons given and that new arbitrators

should be selected. Such decision is conclusive (Rules 7 and 27 of the arbitration rules; see Oltarsh v. Classic Dresses, Inc., 255 App. Div., 532; 7 N.Y.S. 2d 859). There is nothing to indicate that the arbitration committee did not act in good faith in taking the course they did." *Morris Textiles Corp'n v. Schottlant Textile Mills, Inc.*, N.Y.L.J., March 11, 1953, p. 807, Eder, J.

When by resignation of a party-appointed arbitrator a vacancy is declared pursuant to Arbitration Rule 7 of the National Federation of Textiles, then a successor arbitrator shall be appointed in the same manner as the predecessor arbitrator was appointed. The claim that the party should not have been allowed to select another arbitrator after the arbitrator selected by him had resigned, was held without merit in view of the aforementioned provision. *Knickerbocker Textile Corp. v. Donath*, N.Y.L.J., February 13, 1952, p. 495, Botein, J.

Impossibility to select a third arbitrator by two arbitrators should not thwart the arbitration. Said the court: "It is the view of the court that it was not the legislative intent that where there are two arbitrators, empowered to select a third where there is a lack of unanimity, that by refusal to so act the arbitration can be stymied and indefinitely so. To hold that it can be thus suspended is to attribute to the Legislature an absurd intent. It is an established canon of statutory construction that the Legislature intends good shall result from the enactment of the laws and not absurd results. It is, therefore, the conclusion of the court that, so construed, it has jurisdiction, under section 1452, Civil Practice Act, to appoint a third arbitrator." *L. & R. Hewett Const. Corp'n v. Ausnit*, N.Y.L.J., March 13, 1953, p. 843, Eder, J.

Attitude of arbitrators during a hearing, especially their reading, over party's objection, of the court's opinion setting aside a previous arbitration award, was not considered prejudicial to the party and an award was therefore not vacated. (For details, see article by Lionel Popkin in *Arb. J.* 1953 p. 37.) *A. M. Perlman, Inc. v. Raycrest Mills, Inc.* 280 App. Div. 744, 117 N.Y.S. 2d 572 (First Dept., Breitel, J.).

Bias of the arbitrators when first challenged in the court proceeding to confirm the award, did not prevent its confirmation. Said the court: "It is quite clear from the papers that the parties knew the nature and extent of the relations existing between two of the arbitrators and the parties to this proceeding. One of the arbitrators stated before the proceedings started that he had participated in joint ventures with the petitioner and was still participating in joint ventures with him. The fact that subsequently and during the course of the hearings the petitioner became a 50 per cent stockholder in a corporation in which this arbitrator was likewise a 50 per cent stockholder in no way changes the situation. Such holdings are very much in the nature of the relationship which exists between joint venturers. Having knowledge of the relationship and having waived any disqualification which may have arisen therefrom, respondent cannot now be heard to raise this issue (Newburger et al. v. Rose, 228 App. Div. 526)." *D. Alper Co., Inc. v. Southametco, Inc.*, N.Y.L.J., December 22, 1952, p. 1561, Nathan, J.

When a party failed, after notice, to designate an arbitrator under the rules of the National Federation of Textiles, the Committee on Arbitration of that Federation, in accordance with the Rules, may properly designate the arbitrator. When the party participated in the arbitration on the merits, it thereby waived, said the court, "any right it might otherwise have had to object to the proceedings." *Tanbro Fabrics Corp'n v. Jimmy Whellan Sons, Inc.,* N.Y.L.J., January 15, 1953, p. 153, Botein, J.

An arbitrator designated by a party when a member of a law firm which occasionally represented that party in matters prior to the arbitration may be disqualified and an award be vacated, because of evident partiality (sec. 10 (b) of the U.S. Arb. Act). Said the court: "There is great hesitation on the part of a court in upsetting an arbitration award. Karppinen v. Karl Kiefer Mach. Co., 187 F. 2d. 32. Normally, proof of business relationships between parties and arbitrators standing alone is not sufficient to vitiate an award, Application of Shapiro, et al., 197 Misc. 241, 97 N.Y.S. 2d 644, modified Shapiro v. Gordon, 277 App. Div. 927, 98 N.Y.S. 2d 451. However, the relation of attorney and client is certainly beyond a normal business relationship. It is admitted by petitioners that the law firm of the arbitrator, appointed by the petitioners, represented petitioners in admiralty cases in the past. It is not claimed that the arbitrator, personally, ever acted as attorney for the party, but, likewise in his affidavit, the arbitrator does not assert that at the time of the arbitration, he had no knowledge that his law firm had ever acted as attorney for the petitioners. The arbitrator does state that he was not asked about past professional relationships with either of the parties. However, I do think that the facts warranted a voluntary disclosure. Interest or bias may disqualify an arbitrator, Petrol Corp. v. Groupement D'Achat Des Carburants, 84 F. Supp. 446, Cf. Williston, Contracts Sec. 1923A." An appeal from the order vacating the award and granting a new arbitration was dismissed, the order not being a final determination. *Stathatos v. Arnold Bernstein Steamship Corp.,* U.S. District Court S. D. New York, In Admiralty No. A 163–178, Noonan, J.

V. ARBITRATION PROCEEDINGS

"Even if the evidence objected to be held to have been inadmissable in a court of law, the award, being within the terms of the submission, may not be impeached for failure to apply strict rules of evidence or for misconception of the law," was the holding of the court in denying a motion to vacate an award. *Robinson (Apparel, Millinery & Accessories Employees Union Local 1506, R.C.I.A., A.F.L.) v. Union-Fern, Inc.* N.Y.L.J., January 6, 1953, p. 40, Nathan, J.

Receiving of additional evidence as to shading or color of the goods was agreed between the arbitrators and the parties in a proceeding under the Rules of the National Federation of Textiles, though it remained doubtful when and how the additional evidence would be received. A later refusal of the arbitrators to hear pertinent evidence was considered misconduct within the meaning of section 1462 (3) C.P.A. and led to vacating the award, the court stating "The facts in this case are distinguishable from those litigated in *Matter of Active Fabrics Corp'n v. Rosedale Fabrics, Inc.* (275 App. Div. 654, aff'd 300 N. Y. 472) for here there was a refusal after an agreement to receive pertinent evi-

dence." *Kalen Uniform Co., Inc. v. Arcola Fabrics Corp'n,* N.Y.L.J., January 14, 1953, p. 137.

Disputes on a contract for construction of a building in Detroit were at the suggestion of the trial court submitted to arbitration, which resulted in a unanimous award of three arbitrators for the construction firm which was paid by the owners. The firm, however, later discovered that the award in its favor was considerably less than it should have been because of testimony of the owners of non-receipt of certain rentals of the building. In view of the alleged falsity of such testimony, the case was submitted by the court with the consent of the owners to the same arbitrators who awarded an additional sum. This award was challenged by the owners since the construction firm had accepted the full amount of the award and had failed to return the same. The courts, however, considered the wording of the resubmission and on what conditions within the trial court's discretion, which it did not abuse, referring to 6 Corpus Juris Secundum, sec. 111, p. 262, where it is said: "A party who has received money under an award to which he is entitled at all events, need not plead a tender back as a condition to moving to vacate the award." *Regorrah v. Vigneau,* 55 North Western Reporter 2d 164 (Supreme Court of Michigan, Reid, J.).

In a suit for tresspass on land and cutting and removing timber, a submission to arbitration was entered upon before the Justice of the Peace, to whom it was delivered. He, however, carried the paper in his pocket for so long that the writing in pencil became illegible and he destroyed it. An award to plaintiff for $300 dollars was contested, among other grounds on the fact that it did not conform to the arbitration agreement, the contents of which could, by the way, not be established conclusively by testimony of the Justice of the Peace. The trial court, from the evidence submitted, adjudicated the sum of $300 as damages for plaintiff, and that judgment was confirmed, the court considering it not material "as to what view the trial court took of the evidence in regard to the arbitration agreement, or whether the trial court reached the correct conclusion in like reasoning." *Flack-Beane Lumber Co. v. Bass,* 62 Southern Reporter 2d 235 (Supreme Court of Alabama, December 18, 1952, Livingston, Chief Justice).

Failure to receive documents in evidence in an arbitration procedure does not always justify vacating the award. Said the court: "The movant does not deny that the arbitrator stated that there was no necessity for marking the labels and certificates of inspection in evidence because it would require reopening of the hearing, 'and the arbitrator had already sufficiently examined the labels and that document, knew what it contained, and knew how it affected the contentions of the various parties.' It is thus uncontroverted that the failure of the arbitrator to receive the labels and certificate in evidence was merely a technical error, at most, bearing in mind that the proceeding was informal, that no minutes were taken, and that no substantial injury to the movant appears to have been suffered by reason of the failure to receive the labels and certificate in evidence. Insufficient has been shown to warrant vacating the award on the ground of misconduct." *Balex Co., Inc. v. Jakob,* N.Y.L.J., January 26, 1953, p. 276, Botein, J.

VI. THE AWARD

A contract for the sale of timber containing an arbitration clause gave the buyer the right of cancellation after the first year upon payment of a certain sum as liquidated damages. A majority award which determined, among others, the right to cancellation was vacated inasmuch as this question was not submitted to the arbitrators. Said the court: "It is well established that the jurisdiction to make awards is limited to disputes expressly submitted for arbitration. So also it is equally well settled that one who attacks the legality of an award has the burden of sustaining such attack. We think appellees sustained this burden and agree with the trial court's conclusion that proposition three (cancellation) was not submitted to the arbitrators for determination." *Wright Lumber Co. v. Herron,* 199 F. 2d 446. (Tenth Circuit, Huxman, C. J.).

Deductability of expenses from the proceeds was not clearly to be determined from an award which provided for the payment of proceeds of a sale of liquids, if collected, not mentioning those expenses known to both parties at the time of the arbitration. The court said: "The petitioner is not by indirection seeking to modify or correct the award after the three months' period prescribed by C.P.A., section 1463. The petitioner asks for its confirmation, placing on the award an interpretation which the respondent resists. In the circumstances, the precise relief requested cannot be granted. However, the matter should be brought to a conclusion and the indicated course is to remit the award to the same arbitrator for clarification," referring to Perlowin v. Perlowin Studios, Inc., 278 App. Div. 348. *Rimco Trading Corporation v. Moore McCormack Lines, Inc.,* N.Y.L.J., January 21, 1953, p. 224, Hofstadter, J.

A tenant had consented in 1947 to fixing a reasonable rent, under the Emergency Business Rent Law, by arbitration. The rent was established at $100 per month, and on the same day the landlord and tenant entered a two year lease at the rent of $75 dollars a month. Immediately afterwards the award was confirmed by the court. The tenant paid the $75 rental not only during the term of his lease, but for some time thereafter. When the building was sold, the new owner, relying on the determination of the rent of $100 by the award confirmed by judgment, insisted on the payment of the higher amount. When the tenant refused the landlord brought action in the Municipal Court which denied the motion, and on appeal, the order was reversed and a summary judgment was granted. The court held that, since the award was confirmed by court order, "that order was accepted by the tenant without question or appeal." *Myromax Realty Corp. v. Kaplan,* 115 N.Y.S. 2d 846 (First Dept., Hofstadter, J., dissenting).

An arbitration award in a dispute between a corporation and a retiring stockholder required the corporation to pay the purchase price of the retiring stockholder's shares over a period of time in installments. On an appeal by the corporation from a judgment confirming the award, the latter was modified to accord with statutory requirements that payment of installments be limited to years in which surplus was available (Stock Corp. Law Sec. 58; Penal Law sec. 664, subdiv. 2). *Friedman v. Video Television, Inc.,* 118 N.Y.S. 2d 844 (App. Div., First Dept., February 10, 1953).

When a grievance was filed by the union with the company, but only oral not written, statements were submitted to the arbitrator on the question as to whether or not the discharge was for proper cause, the arbitrator made a determination in favor of the union. Said the court: "Had the award stopped at that point it would have been within the scope of the submission. The vice of the award is that it attempts to go beyond the terms of the submission and finds that, although there was no cause for discharge, there was cause for 'suspension' and for 'disciplinary action.' It then directs that Mancuso be reinstated without back pay. These were not questions which the parties had asked the arbitrator to decide." This, however, did not, in the opinion of the court, vitiate the whole award, since this was no ground for vacating an award set forth in Gen. Stat. sec. 81–61. The court therefore corrected the award in confirming it by striking out those parts which are invalid as exceeding the limits of the submission. *Fulton Markets Inc., v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 371,* Superior Court New Haven County, Conn., December 30, 1952, Comley, J.

Self-contradiction in an award was reason for vacating it, the court saying: "A reading of the award shows that it is in contradiction of the findings of the arbitrator and goes beyond the arbitration submission. The submission presented just one question: 'Was the discharge of Terrence Boyle proper under the contract?' The award reads as follows 'Routeman Boyle should be restored to his job without loss of seniority or any other right under the contract, upon receipt of this decision, except for the forfeiture of two weeks wages, and should be paid back pay for the balance of the time lost.' If the driver was guilty of a violation of the contract, then the discharge of the driver was proper. If, on the other hand, there was no violation of the contract, then there should have been no penalty assessed against the driver. The finding that the discharge was not proper and then making the driver forfeit two weeks' wages cannot be reconciled. The form of the award is an imperfect execution of the powers conferred upon the arbitrator (In re Brooklyn Eagle, Inc. v. McManus, 272 App. Div. 933; Morantz v. Berliant, 275 App. Div. 873)." *Samuel Adler, Inc. v. Local 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* N.Y.L.J., December 24, 1952, p. 1586, Di Falco, J.

A commission agreement provided that if any commissioner intended to cease having his work done by an employer, "and to transfer said work to another, for any reason whatsoever, he shall not be permitted to do so unless and until he shall have communicated his intentions to the Union and shall have first obtained the consent of both the Union and the Employer or, failing to obtain such mutual consent, the approval of the Impartial Chairman." An award of the arbitrator granting injunctive relief and $450 damages, caused by appellant's removal of his work from respondent's plant to appellant's plant, was vacated, because of the arbitrator having no power to make such determination. Said the court: "This provision has no application to a commissioner who transfers work from an employer to himself." *B & M Cleaners & Dyers, Inc., v. Kassan,* 281 App. Div. 753, 118 N.Y.S. 2d 186.

A minority stockholder in a publishing company objected to a merger with a printing company and petitioned the Court of Common Pleas of Montgomery

County, Pa., for an appraisement of the fair value of his shares under § 908 of the Business Corporation Law, as amended. The court appointed appraisers whose report of the fair value was approved by the court, and the plaintiff appealed. The act involved provides that "The award of the appraiser . . . shall be submitted to the court [of common pleas] for determination, and the judgment of the court thereon should be final and conclusive." The appellant admitted that full testimony was taken to determine the fair value of the stock and did not claim any irregularity of the proceedings but complained that the appraisers did not properly exercise their discretion. Said the court, in affirming the judgment which had approved the report of fair value made by the court-appointed appraisers: "Where a *voluntary* contract of arbitration is made providing that the award shall be final, the courts, in the absence of fraud, will not inquire whether the award was warranted by the evidence. *Huckestein & Co. v. J. Kaufman & Bros.*, 173 Pa. 199, 33 A. 1028. In the instant case the statute [15 P.S. § 2852–908] made the contract, which had to be accepted according to all of its terms; and provided that the award was final. It cannot be impeached because of disappointment but only for fraud—and this is not alleged in the instant case." *Duddy v. Conshohocken Printing Co.*, 90 Atlantic Reporter, 2d Series 394 (Superior Court of Pennsylvania, Arnold, J.).

In the District of Columbia an award of a referee or an arbitrator may be vacated or modified only on grounds which are clearly specified by the statute. Said the court: "No showing of the existence of any of these grounds having been made, we see no reason to disturb the judgment of the District Court," which had adopted the decision of a referee. *Stern v. Stern Co. of Washington, D. C.*, 200 F. 2d 364 (D. C. Cir. November 28, 1952). (Note: it should be observed that the District Court, District of Columbia "being a Federal Court, is bound by Federal Statutes, except on matters as to which Congress has indicated expressly or by clear implication that the Federal Statutes shall not apply." *United States v. Jordan*, 109 F. Supp. 528.)

No leave to appeal lies with the Court of Appeals, as it was recently stated in a case where an order of the Supreme Court had modified an award of an arbitrator by striking out the part directing respondent company to pay a stated sum and remitting the matter to the arbitrator for determination of the question of back pay. An appeal was dismissed for the reason that the order did not finally determine the proceedings within the meaning of the Constitution. *United Piece Dye Works v. Emil Rieve, as General President of Textile Workers Union of America*, C.I.O., 304 N.Y. 787, 109 N.E. 2d 82.

A lease dispute which had been in court for years was submitted to arbitration, by a submission made in court, to three laymen who, as stated by the Court "by reason of their own knowledge, experience and observation of the premises involved could arrive at a figure better than the Court could which had to depend on witnesses." When both parties waived procedural matters as to oaths, notice of hearing and taking of testimony by conference with the arbitrators, an award was not to be set aside on a motion of defendant for lack of strict compliance with rules relating to arbitration as set forth in a former opinion of the Supreme Court of Florida, Cassara v. Wofford, 55 S. 2d 102 (digested in Arb. J. 1952 p. 55). *Cassara v. Wofford*, 62 Southern Reporter 2d 56 (Fla., December 19, 1952, rehearing denied January 16, 1953, Roberts, J.).

Publications

Fifth Annual Conference on Labor, New York University. The proceedings, edited by Emanuel Stein, are an expansion of the original lectures by footnote citations and other addenda. They deal with many aspects of labor relations and social security and specifically with current issues of the National Labor Relations Act, such as operation of unfair labor practices, welfare and insurance plans, secondary union security and other questions of current significance. New York: Matthew Bender & Co., 1952, 857 p., $8.50.

Lectures on the Law and Labor-Management Relations, delivered at the Summer Institute on International and Comparative Law, University of Michigan Law School (1950), with a foreword by Russell A. Smith, cover a wide variety of issues in the field of collective bargaining agreements, some of them seen from most interesting viewpoints of comparative law in Great Britain, Canada, Sweden and the Netherlands. Voluntary Arbitration of Labor Disputes, especially types of arbitration tribunals, and standards of arbitral decisions, has been dealt with in lectures by Clarence M. Updegraff, David A. Wolff, D. L. Sharfman, J. Noble Braden, George W. Taylor, Charles C. Killingworth, Harry H. Platt, Gabriel N. Alexander, and Ralph T. Seward. Many notes and references to current literature make the volume a valuable piece of source material. Ann Arbor, Michigan: University of Michigan Press. 502 pp. $6.00.

Labor arbitration is comprehensively discussed in a series of nine monographs edited by George W. Taylor and sponsored by the Labor Relations Council of the Wharton School of Finance and Commerce. To mention only the titles of the publications by well-known authorities shows the impact which the technique of labor-management arbitration has on vital questions: Economic Data Utilized in Wage Arbitration (Jules Bachman); Labor Arbitration and the Courts (Jesse Freidin); The Submission Agreement in Contract Arbitration (Morrison and Marjorie Handsaker); Arbitration in the San Francisco Hotel and Restaurant Industries (Van Dusen Kennedy); Arbitration in Transit (Alfred Kuhn); Acceptability as a Factor in Arbitration Under an Existing Agreement (William E. Simkin); Industrial Discipline and the Arbitration Process (Robert H. Skilton); Wage-Reopening Arbitration (L. Reed Tripp); and Historical Survey of Labor Arbitration (Edwin E. White). Philadephia: University of Pennsylvania Press. $10.00 per set of nine monographs.